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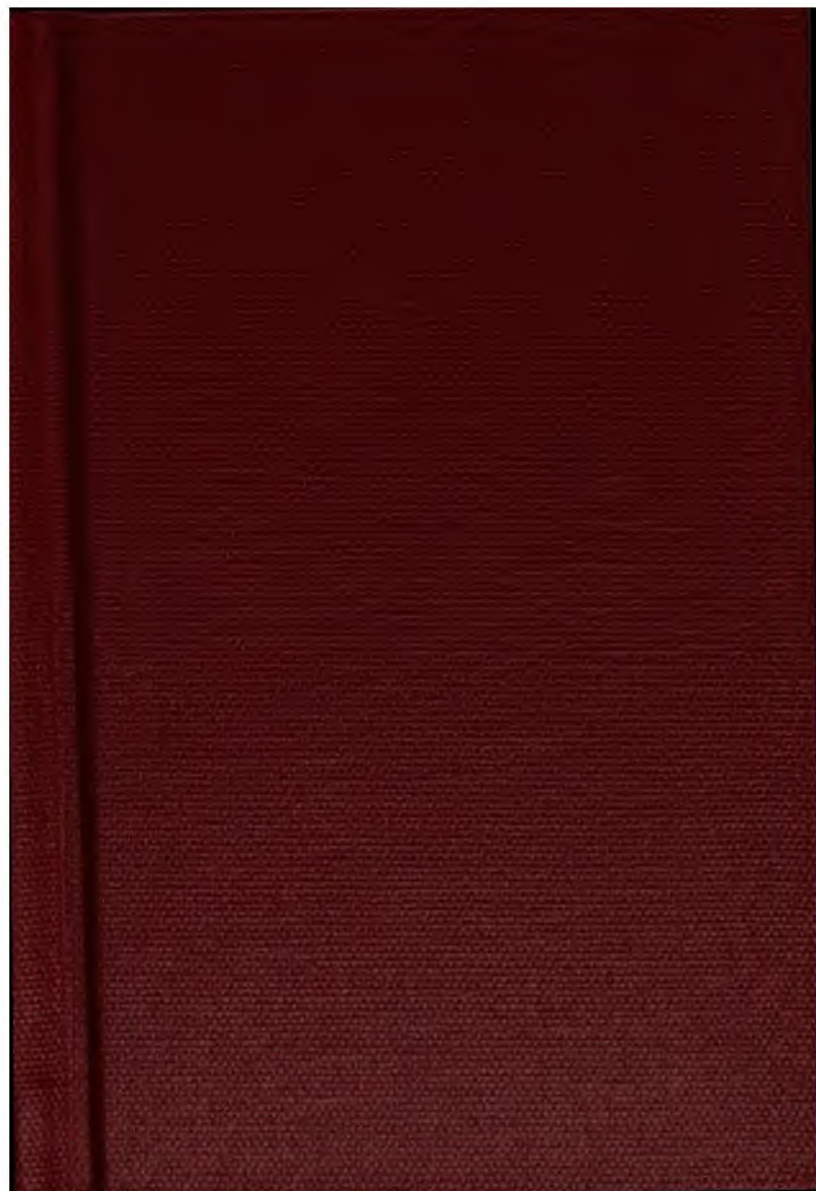
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THE

LAW OF EVIDENCE

IN CIVIL CASES

BY
BURR W. JONES

OF THE WISCONSIN BAR

LECTURER ON THE LAW OF EVIDENCE AND OTHER SUBJECTS
IN THE LAW SCHOOL OF THE UNIVERSITY OF WISCONSIN

IN THREE VOLUMES

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EVIDENCE.

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§ 651. Depositions not admissible at common law.—The early common law courts

seem to have regarded it as a sanction of the highest importance that witnesses should testify in open court in the presence of the judge and jury, and in so public a manner that the demeanor and conduct of the witness could be subjected to public scrutiny. So jealously did the common law judges insist upon these tests, that it was not their practice to receive depositions in evidence. It is true that the courts of common law sometimes used indirect means to coerce a party into a consent to the examination, under a commission, of witnesses who were absent in foreign countries. "These means of coercion were various, such as putting off the trial or refusing to enter judgment, as in case of nonsuit, if the defendant was the recusant party, or by a stay of proceedings till the party applying for the commission could have recourse to a court of equity by instituting a new suit there, auxiliary to the suit at law. But subsequently the learned judges appear not to have been satisfied that it was proper for them to compel a party, by indirect means, to do that which they had no authority to compel him to do directly; and they accordingly refused to put off a trial for that purpose. This inconvenience was therefore remedied by statutes which provided that in all cases in the absence of witnesses, whether by sickness, or traveling out of the jurisdiction, or residence abroad, the courts, in their dis-

cretion for the due administration of justice, may cause the witnesses to be examined under a commission issued for that purpose."¹ In the act of congress to establish the judicial courts of the United States, passed in 1789, liberal provision was made for taking deposition in the federal courts.² In the various states a similar policy has been pursued and the courts generally recognize the necessity of encouraging a method of securing testimony which, under a government consisting of many states widely separated and having independent jurisdiction, has become indispensable to administration of justice. Hence it will be found that in this country the right to use depositions as evidence, under prescribed conditions, belongs to the inferior courts as well as to those of general jurisdiction.

1, 1 Greenl. Ev. sec. 320. A very elaborate discussion of the many English statutes on the subject will be found in Taylor on Evidence chap. 5, vol. 1, and chap. 1, part 3, vol. 2.

2, U. S. Stat. 24 Sept. 1789, ch. 20 sec. 30, vol. 1, p. 88. See secs. 653 *et seq.* *infra*.

1652. Depositions received in chancery practice—To perpetuate testimony—De bene esse.—Under the more liberal procedure of the courts of chancery, the idea was not tolerated that no definite means should be provided for obtaining the testimony of witnesses who could not be produced at the

trial; and, from an early period, those courts exercised the jurisdiction of taking the testimony of absent or infirm witnesses. One mode of exercising this jurisdiction was to take depositions to perpetuate testimony, *in perpetuam rei memoriam*. This practice was allowed in cases where litigation or controversy was expected, but not commenced; and where there was danger that the testimony of a material witness would be lost by reason of his death or departure from the country. In a *bill to perpetuate testimony*, the sole relief prayed for was the preservation of the evidence in question. Hence, after the examination of the witness, the suit terminated and the evidence so taken was held for use after the death of the person examined or his inability to attend the trial, in case the contingency for such use should arise. The courts of chancery also supplied the defects of practice in the common law courts by entertaining jurisdiction to obtain depositions of another class, that is, by bills to take testimony *de bene esse*. Bills of this character, like those to perpetuate testimony, were auxiliary to proceedings in the courts of law, and were designed to preserve for use testimony of witnesses which might otherwise be lost by reason of death or absence. Although there were other points of difference between the two forms of procedure, the most important distinction was that the

bill to perpetuate testimony could be maintained only where no present suit could be brought at law by the moving party, while bills to take testimony *de bene esse* were only proper in aid of a suit already commenced.¹

1, *Angell v. Angell*, 1 Sim. & St. 83; *Philips v. Carew*, 1 P. Wms. 117.

§ 653. Depositions under statutes—
On commission—De bene esse.—Both in England and in the United States, statutes have been quite generally enacted remedying the defects of the common law procedure in respect to taking testimony by depositions. In the United States, the two kinds of depositions in most common use are known as depositions *de bene esse* and those taken by virtue of a commission, generally called *dedimus potestatem*. Depositions *de bene esse* are generally taken on verbal interrogatories to the witness, on such notice to the adverse party as is required by the statutes, before officers authorized to take depositions. No order of court is necessary for their taking.¹ In respect to depositions taken pursuant to a commission or *dedimus*, more formalities are required. The party desiring to take the deposition applies to the court in which the action is pending for a commission to the person who is expected to take the testimony. The moving party is also required to prepare and serve written interrogatories upon the

attorney of the adverse party, which, with the cross-interrogatories, if any are proposed, are filed with the clerk of the court before the commission is issued. After the person named as commissioner receives the commission with the interrogatories, he propounds to the witness the direct and cross-interrogatories, and, after the commission is executed, returns the deposition to the court in which the action is pending. It will be seen that these two modes of taking depositions are entirely distinct, and rest upon wholly different statutory provisions; and depositions taken under a *dedimus potestatem* are, under no circumstances, to be considered as taken *de bene esse*.²

1, *Pettibone v. Derringer*, 4 Wash. (U. S.) 215; *Buckingham v. Burgess*, 3 McLean (U. S.) 368. See also, *Walker v. Parker*, 5 Cranch C. C. 639. For a general discussion of the rules of practice relating to depositions, see an article by H. Campbell Black, 25 Cent. L. Jour. 581.

2, *Sergeant v. Biddle*, 4 Wheat. 508.

§ 654. Depositions de bene esse in the federal courts.—By the present federal statute, "the testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States or out of the district in which the case is to be tried

and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or a superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney, proposing to take such deposition, to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party until a claim shall have been put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district

shall think reasonable, and direct. Any person may be compelled to appear and depose as provided by this section in the same manner as witnesses may be compelled to appear and testify in court."¹

1, Rev. Stat. U. S. sec. 863; Shutte v. Thompson, 15 Wall. 151. See note, 13 Fed. Rep. 839.

§ 655. Whose depositions may be taken under federal statute.—The statute quoted in the last section is to be construed in connection with section 865 which provides that, "unless it appears to the satisfaction of the court that the witness is then dead, or gone out of the United States or to a greater distance than one hundred miles from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity or imprisonment, he is unable to travel and appear at court, such deposition shall not be used in the cause."¹ Accordingly it has been held that, if a witness lived more than one hundred miles away, when his deposition was taken, it will be *presumed that he continued to live there* at the time of the trial; and no further proof on that subject need be furnished by the party offering the deposition, unless this presumption shall be overcome by proof from the other side. But if it be overcome, and the party has knowledge of his power to get the witness in time to enable him to secure his attendance at the trial, he

must do so, or the deposition will be excluded.³ It was held in an early case that the fact that a person was a seaman on board a gun boat, and liable to be ordered to some other place, and not to be able to attend the trial was not a legal cause for taking his deposition.⁴ If the witness resides more than one hundred miles from the place of trial, it is immaterial whether he resides within or outside the judicial district,⁴ or whether his residence there is permanent or temporary.⁵ A witness is not incompetent to testify in court because he lives more than one hundred miles from the place of trial, in other words, the taking of the deposition on that ground *is not compulsory*; and, if the exigencies of the case require that witnesses living more than one hundred miles away should testify, they *may appear and testify in court*, if willing to come.⁶ The *certificate of the magistrate* who takes the deposition that the witness resides more than one hundred miles from the place of trial is *prima facie* evidence of that fact.⁷ But it must affirmatively appear that the witness resides more than one hundred miles from the place of trial.⁸ Under the present statutes, the *depositions of parties*, as well as those of other witnesses, may be taken under this statute; and if the first deposition is not satisfactory, another may be taken without any order of the court.⁹

1, Rev. Stat. U. S. sec. 865.

- 2, Whitford v. Clark Co., 119 U. S. 522, where the witness was in court ready to testify.
- 3, The Samuel, 1 Wheat. 9.
- 4, Patapsco Ins. Co. v. Southgate, 5 Peters 604.
- 5, Mutual Ben. L. Ins. Co. v. Robison, 58 Fed. Rep. 723.
- 6, Prouty v. Draper, 2 Story (U. S.) 199.
- 7, Patapsco Ins. Co. v. Southgate, 5 Peter 604; Bell v. Morrison, 1 Peters 351.
- 8, Dunkle v. Worcester, 5 Biss. (U. S.) 102; Curtis v. Central Ry., 6 McLean (U. S.) 401.
- 9, Cornett v. Williams, 20 Wall. 226; Lowery v. Kusworm, 66 Fed. Rep. 539.

§ 656. Before whom depositions may be taken—The notice.—The statutes already quoted sufficiently state the persons before whom the deposition may be taken. In a recent case, the notice was to the effect that the deposition would be taken before a notary public, naming him, or some other officer authorized by law to take depositions. The deposition was, in fact, taken before another notary, authorized to take depositions in such cases. It was held in the supreme court of the United States that an objection to the deposition on this ground was without merit.¹ The *notice should show that cause exists* for taking the deposition, so that the adverse party may know whether to attend. Thus, where a notice stated only that the witness was about to leave the state, but did not state that he was bound on a voyage to sea, or to leave the United States, or to go

one hundred miles from the place of trial, it was held insufficient.² The notice must be *in writing*, and must state the time and place of taking the deposition.³

1, Gormley v. Bunyan, 138 U. S. 623.

2, Harris v. Wall, 7 How. 693. But see, Debutts v. McCulloch, 1 Cranch C. C. 286.

3, Dunlop v. Monroe, 1 Cranch C. C. 536; Rev. Stat. U. S. sec. 863 cited *supra*.

§ 657. The notice—Time of giving.

It will be observed that, unlike most statutes relating to depositions, this one prescribes no definite rule as to the time when notice shall be given. The *notice must be "reasonable;"*¹ but in determining whether the notice has been reasonable, within the meaning of the statute, the circumstances of each case must be considered, and much must be left to the *discretion of the court.*² If there is no necessity for a short notice, the deposition may be properly excluded.³ But under peculiar circumstances, an hour's notice of the time and place may be reasonable.⁴ In a state court, where a similar statute has been construed, it has been held that such notice should be given as would, not only enable the party to be present, but also such as would *enable him to procure the attendance of his counsel.*⁵ The notice is not sufficient, if it is served on counsel who cannot attend to the taking of the deposition, without being absent either

from the term of court at which the action is for trial, or from the commencement of the term.⁶ It is not the meaning of the section that a party might be able to compel his adversary at great cost to retain and instruct numerous counsel in different places, and it might be important for counsel to be personally present.⁷ Where the notice specifies the time and place, and states that the taking will be adjourned from day to day until completed, this is sufficient notice of the taking on *succeeding days*, when the examination is not completed on the first day. This rule was applied in a case where part of the witnesses were examined on the first day in the presence of the opposite party and his counsel, but on a succeeding day, to which the hearing was adjourned, they were absent.⁸

1, See statutes quoted *supra*.

2, Union Pac. Ry. Co. v. Reese, 56 Fed. Rep. 288.

3, Jamieson v. Willis, 1 Cranch C. C. 566; Renner v. Howland, 2 Cranch C. C. 441; Barrell v. Simonton, 3 Cranch C. C. 681.

4, Leiper v. Bickley, 1 Cranch C. C. 29. As to one day's notice, see, Bowie v. Talbot, 1 Cranch C. C. 247; Atkinson v. Glenn, 4 Cranch C. C. 134.

5, Kimpton v. Glover, 41 Vt. 283. See sec. 674 *infra*.

6, Bell v. Nimmon, 4 McLean (U. S.) 539; Allen v. Blunt, 2 Wood. & M. (U. S.) 121.

7, Uhle v. Burnham, 44 Fed. Rep. 729, where it was held that, though counsel appear and cross-examine witness, the objection is not waived.

8, Knode v. Williamson, 17 Wall. 586.

§ 658. Same — Names of witnesses — Of the court and officer. — Though the notice must be so definite and certain as to the time, place and names of witnesses, as to give the adversary an opportunity to attend and cross-examine the witnesses,¹ yet a notice giving the surnames of the witnesses may be sufficient, where the Christian names are unknown.² The deposition should not be rejected on account of *technical defects* in the notice as to the name of the court in which the action is pending, when it is obvious that there could be no mistake on the part of the other party with reference to the case to which the notice applies.³ Nor is it any objection that the deposition is taken before another than the one named in the notice, when the notice contains the words, "or before some officer authorized by law to take depositions;"⁴ and where a notice has been served, but not in compliance with the statute, the *informalities are waived*, if the adverse party appears by counsel and cross-examines the witness.⁵

1. Knode v. Williamson, 17 Wall. 586, defects as to date and place.

2. Claxton v. Adams, 1 McArth. (D. C.) 496. See also, Carrington v. Stimson, 1 Curt. (U. S.) 437.

3. Gormley v. Bunyan, 138 U. S. 623. See sec. 687 *infra*.

4. Gormley v. Bunyan, 138 U. S. 623.

5. Dinsmore v. Maroney, 4 Blatch. (U. S.) 416. The same

is true where the deposition is taken at another place than that stated in the notice, but in the presence of the parties, *Gartside Coal Co. v. Maxwell*, 20 Fed. Rep. 187. See secs. 689 *et seq. infra*.

§ 659. **Service of the notice.**—It is provided by the statute that the notice shall be given "by the party or his attorney proposing to take such deposition."¹ The notice may be served by any person, even a party to the suit. The statute has been so construed as to require a *personal service* of the notice,² and that the notice must be served upon the attorney of the opposite party.³ It will be observed, however, that, by the statute, *when the giving of the usual notice is impracticable*, by reason of the absence from the district and the want of an attorney of record, or other reason, "it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable, and direct."⁴ When the statute was originally enacted, it permitted *ex parte* depositions to be taken without notice, where the adverse party resided more than a hundred miles from the place of trial.⁵ But even during the existence of this statute, the practice was discouraged by the courts as contrary to the course of the common law, and as calculated to elicit only a partial statement of the truth.⁶

1, Rev. Stat. U. S. sec. 863 quoted *supra*. See also, Young v. Davidson, 5 Cranch C. C. 515.

2, Buddicum v. Kirk, 3 Cranch 293; Carrington v. Stimson, 1 Curt. (U. S.) 437. Copy left at the lodgings of defendant held insufficient, Hill v. Narwell, 3 McLean (U. S.) 583.

3, Leiper v. Bickley, 1 Cranch C. C. 29; Barrell v. Simon-ton, 4 Cranch C. C. 70. If the United States is a party, service must be on the United States district attorney, The Argo, 2 Gall. (U. S.) 314.

4, Rev. Stat. U. S. sec. 863 quoted *supra*.

5, Judiciary act 1789 sec. 30.

6, Walsh v. Rogers, 13 How. 283, 287.

1660. Mode of taking—The federal statutes provide that "every person deposing, as provided in the preceding section, shall be cautioned and sworn to testify to the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent.¹" In the absence of any facts showing waiver of these statutory requirements, they must, of course, be observed. The witness should be sworn to testify to the whole truth on the entire subject matter of the deposition and not merely the whole truth in response to each interrogatory.² It is sufficient, if it appears that the witness was properly sworn, and further caution to the witness is unnecessary.³ On this point, if the *certificate of*

the officer states that the witness was cautioned and sworn, it is sufficient.⁴ The witness may be sworn before or after his deposition has been reduced to writing.⁵ Each material interrogatory must be substantially answered, and the failure to answer invalidates the deposition.⁶

1, Rev. Stat. U. S. sec. 864; *Moller v. United States*, 57 Fed. Rep. 490.

2, *Wilson Sewing Machine Co. v. Jackson*, 1 *Hughes* (U. S.) 295; *Pendleton v. Forbes*, 1 *Cranch C. C.* 507; *Garrett v. Woodward*, 2 *Cranch C. C.* 190; *Rainer v. Haines, Hempst.* (U. S.) 689.

3, *Moore v. Nelson*, 3 *McLean* (U. S.) 383; *Brown v. Batt*, 2 *Cranch C. C.* 253.

4, *Edmonson v. Barrell*, 2 *Cranch C. C.* 228.

5, *Tooker v. Thompson*, 3 *McLean* (U. S.) 92.

6, *Ketland v. Bissett*, 1 *Wash. (U. S.)* 144. But see, *Bell v. Davidson*, 3 *Wash. (U. S.)* 328.

§ 661. **The certificate.** — In several cases it has been held fatal to the deposition that the certificate failed to state either that the testimony had been reduced to writing by the magistrate taking the deposition, or by the witness in the presence of the magistrate.¹ The deposition must in all cases be subscribed by the deponent.² It will not be presumed that the officer taking the deposition is of counsel in the case or interested in the result; and it is not necessary that the certificate should contain any statement upon that subject.³ On this point, however, there is a con-

flict of opinion; and in several later cases, it is maintained that it should affirmatively appear on the face of the certificate that the officer is one authorized by the statute to take depositions.⁴ In a recent case, the notary certified that he was not an attorney for either party, but did not state that he was not interested; it appeared that the testimony was taken in shorthand by a disinterested person; and it was held that the deposition was admissible.⁵ The statute requires that depositions *de bene esse* be retained by the magistrate until delivered by his own hand into the court for which it is taken; or that it shall, together with a certificate of the reasons for taking it and the notice, if any, given to the adverse party, be sealed up by the magistrate and directed to such court, and remain under his seal until opened in court.⁶ Since the officer's authority to take depositions is special and confined to certain limits, the facts calling for the exercise of such *jurisdiction should appear upon the face of the deposition.*⁷ Hence, it has been held that, if no sufficient reason is stated in the deposition or notice attached, it should not be read,⁸ and that the names of the parties to the suit should be given;⁹ but it is not necessary to state the names of all the parties, if there are several.¹⁰

1, Cook v. Burnley, 11 Wall. 659; Bell v. Morrison, 1 Peters 351; Edmonson v. Barrell, 2 Cranch C. C. 228. If the deposition is in the writing of the magistrate, it need

not be certified to have been written in the presence of the witness, *Van Nesse v. Heinike*, 2 Cranch C. C. 259; *Vasse v. Smith*, 2 Cranch C. C. 31. As to certificates in the state courts, see sec. 713 *infra*.

2, *Thorpe v. Simmons*, 2 Cranch C. C. 195.

3, *Miller v. Young*, 2 Cranch C. C. 53; *Peyton v. Veitch*, 2 Cranch C. C. 123.

4, *Gartside v. Maxwell*, 20 Fed. Rep. 187; *Donahue v. Roberts*, 19 Fed. Rep. 863.

5, *Stewart v. Townsend*, 41 Fed. Rep. 121.

6, Rev. Stat. U. S. sec. 865. If the deposition is opened out of court, without the consent of the other party, it should not be received, *Beale v. Thompson*, 8 Cranch 70. Such consent should be written, *The Roscius*, 1 Brown Adm. (U. S.) 442.

7, *Harris v. Wall*, 7 How. 693.

8, *Harris v. Wall*, 7 How. 693.

9, *Peyton v. Veitch*, 2 Cranch C. C. 123; *Centre v. Keene*, 2 Cranch C. C. 198; *Smith v. Coleman*, 2 Cranch 237; *Allen v. Bunt*, 2 Wood. & M. (U. S.) 131; *Buckingham v. Burgess*, 3 McLean (U. S.) 368.

10, *Egbert v. Citizens Ins. Co.*, 7 Fed. Rep. 47.

§ 662. *Same, continued.*—The *place of taking* the deposition should be stated in the certificate.¹ The distance from the place of trial need not be stated, if the distance is in fact, and well known by all parties to be, more than one hundred miles.² The deposition is not necessarily to be rejected merely because the *names* are *not correctly given* in some portion of the deposition, or because the names of all the parties to the action are not stated;³ nor because the notice is not attached to the deposition.⁴ The certificate is *prima facie*

evidence of the facts necessary and proper to be stated by it,⁵ as that the witness affirmed, on account of conscientious scruples about taking the oath;⁶ or that the deposition was reduced to writing by the magistrate or witness;⁷ or that the witness lives more than one hundred miles from the place of trial,⁸ or that the person taking the deposition holds the office he assumes to hold.⁹ The certificate need not state that the officer taking it has retained it until mailing,¹⁰ nor that he has delivered the deposition to the court.¹¹

1, Tooker v. Thompson, 3 McLean (U. S.) 92.

2, Egbert v. Citizens Ins. Co., 7 Fed. Rep. 47.

3, Voce v. Lawrence, 4 McLean (U. S.) 203; Pannill v. Eliason, 3 Cranch C. C. 358. See sec. 687 *infra*.

4, Stewart v. Townsend, 41 Fed. Rep. 121.

5, Bell v. Morrison, 1 Peters 351.

6, Elliott v. Hayman, 2 Cranch C. C. 678; Wilson Co. v. Jackson, 1 Hughes (U. S.) 295.

7, Bussord v. Catalino, 2 Cranch C. C. 421.

8, Patapsco Ins. Co. v. Southgate, 5 Peters 604; Merrill v. Dawson, Hempst. (U. S.) 563; Tooker v. Thompson, 3 McLean (U. S.) 92.

9, Vasse v. Smith, 2 Cranch C. C. 31; Price v. Morris, 5 McLean (U. S.) 4; Ruggles v. Bucknow, 1 Paine (U. S.) 358. This fact may also be proved by parol, Dunlop v. Monroe, 1 Cranch C. C. 536; Paul v. Lowry, 2 Cranch C. C. 628. If the officer has an official seal, it should be attached, Paul v. Lowry, 2 Cranch C. C. 628.

10, Stewart v. Townsend, 41 Fed. Rep. 121.

11, Egbert v. Citizens Ins. Co., 7 Fed. Rep. 47.

1663. Waiver of objections. — Although it is the undoubted rule that the statutory provisions already referred to must be substantially complied with, in order that the deposition may be received, the qualification must be borne in mind that these provisions, respecting notice and the authentication of the deposition, are for the benefit of the party against whom the deposition is to be used, and hence such *provisions may be waived* by him. In a leading case on this subject, it did not appear that the witness was sworn to testify to the whole truth; nor was there any certificate of the reason why the deposition was taken before a township justice, and not by any magistrate described in the act of congress. But it also appeared that the witness was an aged man when his deposition was taken; that he had died before the trial; that one of the opposing counsel had attended the taking of the deposition and cross-examined the witness, making no objection to the sufficiency of the oath, to the reasons for taking the deposition or to the competency of the magistrate, and that no exception had been taken to the deposition, until it had been filed for a year. The court held that, under these circumstances, the consent of the defendant to the taking of the deposition must be presumed, and that such participation in the proceedings and failure to object was a complete

waiver of all formal objections.¹ But the fact that the attorney for the opposite party attended, but refused to take part in the proceedings, does not waive informalities or cure defects in the certificate.² If no objection is made to the deposition when offered, it is then too late to raise an objection in the appellate court; it was so held, even though, before trial or at a former term of the court, a motion had been made to suppress or set aside the deposition.³

1, *Shutte v. Thompson*, 15 Wall. 151. The same rule was held where a party cross examined a witness, knowing him to be incompetent, *United States v. One Case of Hair Pencils*, 1 Paine (U. S.) 400.

2, *Harris v. Wall*, 7 How. 693.

3, *Brown v. Tarkington*, 3 Wall. 377; *Ray v. Smith*, 17 Wall. 411, 417; *Northern Pac. Ry. v. Urlin*, 158 U. S. 271.

1664. Same—Objections—When made.

The waiver of objections or the consent to read a deposition continues and is operative at a *second trial* of the same action.¹ If a party, knowing the contents of a deposition, consents that it may be read, this is a waiver of objections to incompetency, as well as competent testimony.² Where the envelope containing the deposition is not properly endorsed or authenticated, this may be waived by a stipulation for publication and opening.³ Where objections to a deposition do not go to the testimony of the witness, but relate to defects which might have been obviated by re-

taking the deposition, such objections should be made and noted when the deposition is taken or made by motion to suppress, and, if not made until the trial, they are waived.⁴ "The party taking the deposition is entitled to have the question of its admissibility settled in advance. Good faith and due diligence are required on both sides. When such objections, under the circumstances of this case, are withheld until the trial is in progress, they must be regarded as waived, and the deposition should be admitted in evidence. This is demanded by the interests of justice. It is necessary to prevent surprise and the sacrifice of substantial rights. It subjects the other party to no hardship. All that is exacted of him is proper frankness."⁵ The same rule was declared where the objections to the deposition were to the *form of the commission* and the mode of taking the deposition; where defendants, after service on them of notice of issuing a commission, waived a copy of the interrogatories and consented that a commission issue upon the direct interrogatories, and where the motion to suppress the deposition was not made for some weeks after it was filed, and not until the case came to trial.⁶ So where a *commission is issued by consent*, and one of the parties joins in the commission by naming a commissioner on his part, he cannot afterward object that the rule has been issued improvidently, or that it was im-

properly obtained;⁷ and where a copy of a document is annexed to the answer of a witness, examined on a commission, and no objection to the copy is taken at the examination, or by motion to suppress made afterwards, the objection that the original was not produced or accounted for will not be entertained.⁸

1, Vattier v. Hinde, 7 Peters 252; Edmondson v. Barrell, 2 Cranch C. C. 228.

2, Harris v. Wall, 7 How. 693.

3, Stewart v. Townsend, 41 Fed. Rep. 121.

4, Bibb v. Allen, 149 U. S. 481.

5, Doane v. Glenn, 21 Wall. 33, where the deposition was taken under a commission *dedimus potestatem*. As to waiver of objection that certificate does not state cause of taking, by waiting until trial, see, Stegner v. Blake, 36 Fed. Rep. 183.

6, Howard v. Stillwell Co., 139 U. S. 199.

7, Sergeant's Lessee v. Biddle, 4 Wheat. 508.

8, York Co. v. Central Railroad, 3 Wall. 107. As to waiver of objections in state courts, see secs. 689 *et seq. infra*.

§ 665. Depositions dedimus potestatem.—The revised statutes contain a provision that, in any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and that the provisions of statute already discussed do not apply to any deposition to be taken under the author-

ity of this section. Although the motion for a commission under this statute is generally granted, it does not issue as a matter of course. The question whether the order is necessary to prevent a failure or delay of justice is for the court to determine in each case upon the facts presented.¹ It was so held in a criminal case where the motion of the defendant was resisted. The witnesses resided hundreds of miles from the place of trial, their testimony was material and the defendants were unable to pay the cost of bringing them to the place of trial. These facts were deemed to show sufficient necessity for the issuing of the commission.² The motion should be based on an affidavit showing it to be necessary.³

1, United States v. Cameron, 15 Fed. Rep. 794; United States v. Parrott, McAll. (U. S.) 447.

2, United States v. Cameron, 15 Fed. Rep. 794.

3, Suttan v. Mandeville, 1 Cranch C. C. 115.

1866. Procedure in obtaining the commission.—The procedure in obtaining the commission is generally regulated by rules of the court in the respective districts. By the usual practice, the party desiring a commission enters with the clerk a rule for a commission, naming a commissioner or commissioners on his part, the state, territory or country, as well as the county, city or place where the same is to be taken, together

with the names of the witnesses and the interrogatories to be proposed to the witnesses. A copy of all which is then served upon the opposite party, his agent or attorney for a number of days specified in the rule of court.¹ The opposite attorney may then on his part name a commissioner or commissioners and file cross-interrogatories within a specified time or before the commission issues. At the expiration of the specified time, the commission is made out and issued by the clerk of the court, directed to the commissioner or commissioners by name, accompanied by a copy of the interrogatories on file, together with the names of the witnesses to be examined.² The commissioner may be an officer or one not an officer; and the statute relating to depositions *de bene esse* has no application in this respect.³ As in the case of other depositions, the one seeking to use a deposition, taken in this method, must see that a *notice is given to the adverse party* sufficiently definite and certain to enable him to cross-examine, unless such failure is waived.⁴ But if a party has been served with the notice to file cross-interrogatories and fails to do so, no further notice is necessary.⁵ A party cannot except to depositions taken at his own instance, because he does not produce proof of notice to the adverse party.⁶ When a deposition is taken under a *dedimus* and on interrogatories filed, the parties have *no*

*right to appear and file other interrogatories, or propound oral questions, or even to have the assistance of counsel.*¹ But where a deposition was to be taken in a *foreign country*, and there were no rules of court regulating the subject, it was held that the court in its discretion might allow additional interrogatories to be filed at any time.²

1, Rev. Stat. U. S. secs. 917, 918, where some of the rules regulating this subject are given. It is held that congress has not conferred power on the district and circuit courts to make rules as to the taking of depositions, *Randall v. Venable*, 17 Fed. Rep. 162. But see, *Warren v. Younger*, 18 Fed. Rep. 859.

2, See the rules of United States court of the jurisdiction. See also rule 67, Rules of Practice in Equity U. S. Courts.

3, *Jerman v. Stewart*, 12 Fed. Rep. 271.

4, *Knobe v. Williamson*, 17 Wall. 586.

5, *Merrill v. Dawson*, Hempst. (U. S.) 563.

6, *Yeaton v. Fry*, 5 Cranch 335.

7, *Neeves v. Gregory*, 86 Wis. 319. See sec. 716 *infra*.

8, *Cunningham v. Otis*, 1 Gall. (U. S.) 166.

§ 667. Meaning of the statutory words "common usage."—The words of the statute "according to common usage" refer to the usage prevailing in the courts of the state in which the federal court may be sitting, that is, common usage in the courts which administer justice in the same community. They do not refer to a usage known and recognized only at common law, because,

when the statute was adopted, it was the practice to take depositions under statutes.¹ In suits in equity, the language refers to the practice in the equity courts.² There was a construction of this phrase in a case where one of the parties to the suit, at the request of the commissioner, wrote down the answers of the witness. It appeared that the other party was not present, and hence had not waived the objection, although it did not affirmatively appear that any injury had been sustained. The court held, however, that the practice might lead to grave abuses, since a slight change of expression, not noticed by the witness or magistrate, might materially alter the sense, and that such a practice was not "according to common usage."³ Again it has been held that it is not "according to common usage," in the courts of the United States, to call upon a party to the action to give testimony at the instance of the adverse party before the trial, even though such a practice prevails in the courts of the state in which the federal court is held. The principle that, in actions at law, the practice, pleadings and procedure shall conform in the federal courts as nearly as may be to those of the courts of the state is not applicable in such a case, since the rule of procedure in respect to taking testimony is prescribed by act of congress and must control.⁴ The deposition is taken "according

to common usage," although the certificate does not state that the commissioner is disinterested, if this is not required in the state where the deposition is taken; and the provisions of sections 863-865 of the federal statutes do not apply to this class of depositions.⁵ Nor need the commissioner certify that the deposition was reduced to writing by the clerk in his presence.⁶

1, United States v. Cameron, 15 Fed. Rep. 794.

2, Bischoffsheim v. Baltzer, 10 Fed. Rep. 1.

3, United States v. Pings, 4 Fed. Rep. 714; Dawson v. Poston, 28 Fed. Rep. 606.

4, *Ex parte* Fisk, 113 U. S. 713.

5, Giles v. Paxson, 36 Fed. Rep. 882.

6, Giles v. Paxson, 36 Fed. Rep. 882.

1668. Control over depositions.—Under the federal statutes, the officer taking a deposition is not the agent of the party taking the deposition.¹ He is an *officer of the court*, and should exercise the power of taking the deposition according to the commission issued to him.² It is the duty of the officer to comply with the statutes relating to the return of depositions; and when both parties have examined witnesses before an officer, the *deposition is not under the control of the moving party*. If the commissioner withholds the deposition at his request, the court will, on application, order its return, although the testimony has surprised the person at whose

instance it was taken. The deposition, while in the hands of the commissioner, is just as much beyond the control of the parties as after it has been filed with the court; and, although a party is not compelled to use a deposition taken by himself, he cannot prevent its use by the other party.¹ The taking of depositions is so far under the control of the court that, if a cross-examination has been closed in ignorance of facts material to a further cross-examination, the court, upon a proper showing, can make such order as is just.⁴

1, *Gilpins v. Consequa*, Peters C. C. 85. See secs. 702 *et seq. infra*.

2, *Jones v. Oregon Cent. Ry. Co.*, 3 Sawy. (U. S.) 523.

3, *First Nat. Bank of Grand Haven v. Forest*, 44 Fed. Rep. 246. *In re Rindskoff*, 24 Fed. Rep. 542.

4, *The Normandie*, 40 Fed. Rep. 590.

§ 669. Several commissioners may act—Taking the oath.—Under the rules of procedure, it not unfrequently happens that a commission to take testimony is issued to more than one commissioner. Under such circumstances, if the terms of the commission confer the power upon any one of the persons named, he may execute the commission alone,¹ but he cannot execute it in connection with a person, not named in the commission.² The *commissioners*, however, do not *derive their authority* from the parties,

but from the court; and where the commission is issued to several jointly, they should all join;¹ and the deposition is not admissible in such case when all do not join, even though one of the commissioners refused to act.⁴ If the commissioner is one of the officers of a court of the United States, it is not necessary that he should take any oath.⁵ Although it should appear from the certificate of the commissioner that the general provisions of the commission have been complied with, the return is *prima facie* evidence of the facts therein stated;⁶ and if it is stated that the commissioner took the oath, it will be presumed that it was properly administered.⁷ If it appears that the witness was sworn, it will be presumed that the proper form of oath was administered.⁸ Nor is it necessary to have it appear that there was a sworn interpreter, although the witness was an alien, and the deposition is in the English language.⁹

1, The Griffin, 4 Blatch. (U. S.) 203.

2, Willing v. Consequa, Peters C. C. 301.

3, Gupp v. Brown, 4 Dall. (U. S.) 410; Armstrong v. Brown, 1 Wash. (U. S.) 43.

4, Munns v. Dupont, 3 Wash. (U. S.) 41.

5, Hoyt. v. Hammekin, 14 How. 346.

6, Boudereau v. Montgomery, 4 Wash. (U. S.) 186.

7, Winter v. Simonton, 3 Cranch C. C. 104.

8, Keene v. Meade, 3 Peters 1.

9, Gilpins v. Consequa, Peters C. C. 88.

§ 670. **Miscellaneous.**—As in the case of depositions *de bene esse*, slight *technical errors* in the names of the witnesses, in the form of the caption or in the mode of addressing the deposition on its return to the court, which may be deemed mere matters of form, not likely to mislead either party, *do not invalidate* the proceeding.¹ *All of the interrogatories*, either in form or substance, *should be propounded* to the witness, or the deposition cannot be read.² It has been so held even where the witness omitted certain answers, but stated in answer to a general interrogatory that he knew nothing further material to either party.³ It is the usual practice to send with the commission special interrogatories followed by a general interrogatory calling for any knowledge the witness may have, material to the issue, as to matters not stated in the answer to the special interrogatories. It is not a valid objection to the deposition that the material or most important testimony is given in answer to the general, and not to the special interrogatories.⁴

1, Keene v. Meade, 3 Peters 1; Kansas City, Ft. S. & M. Ry. Co. v. Stoner, 51 Fed. Rep. 649. See sec. 687 *infra*.

2, Winthrop v. Union Ins. Co., 2 Wash. (U. S.) 7; Gilpins v. Consequa, 3 Wash. (U. S.) 184; Richardson v. Golden, 3 Wash. (U. S.) 109.

3, Ketland v. Bissett, 1 Wash. (U. S.) 144.

4, Rhoades v. Selin, 4 Wash. (U. S.) 715.

§ 671. Compelling attendance and production of papers.—In the case of depositions *de bene esse*, the statutes provide that any person may be compelled to appear and testify in the same manner as in court.¹ The commissioner or officer before whom the testimony is to be taken *may issue an attachment* to compel the attendance of a witness, but it should first appear that the facts sought to be proved are relevant; that the officer has jurisdiction to act in taking the testimony, and that the witness is one residing more than one hundred miles from the place of trial.² If the proceeding is under a *dedimus potestatem*, the clerk of any court of the United States for the district or territory is authorized, on the application of either party or of his agent, after the commission is issued, to issue a subpoena to procure the attendance of the witness required; and if a witness, duly subpoenaed, refuses or neglects to attend or to testify before the commissioner, and this is proved to the satisfaction of the judge, the judge of the court whose clerk has issued the subpoena may proceed to enforce obedience to the process, or to punish the disobedience.³ Provision is also made by statute whereby either party may apply to any judge of a United States court within the district, and obtain an order from him to the clerk of the court to issue a *subpoena duces tecum*, requiring the witness to bring with him and pro-

duce to the commissioner any writings, *books or documents* supposed to be material to the issue.⁴ The statute also provides for the enforcement of obedience to such process, and that the commissioner shall cause a copy of such document to be made, if required. It is evidently the object of these statutes to enable a party to procure by deposition any evidence that might be procured by the attendance of the witness in open court.⁵ *Subpoenas* for witnesses who are required to attend a court of the United States, in any district, may run into any other district, provided that, in civil causes, the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.⁶ The distance is to be determined with reference to the usual routes of travel.⁷ If the witness lives within the stated distance, and fails to respond to a subpoena, an *attachment* may issue to be executed in the other district.⁸ Suitors and witnesses are entitled to claim the usual *privilege* of exemption from the *service of process* while in attendance upon the taking of a deposition, whether they reside within or without the state.⁹

1, Rev. Stat. U. S. sec. 863.

2, *Ex parte* Peck, 3 Blatch. (U. S.) 113; *Ex parte* Judson, 3 Blatch. (U. S.) 148.

3, Rev. Stat. U. S. sec. 868.

4, Rev. Stat. U. S. sec. 869.

5, *In re* Shephard, 3 Fed. Rep. 12.

6, Henry v. Ricketts, 1 Cranch C. C. 580.

7, *Ex parte* Beebes, 2 Wall. Jr. (U. S.) 127.

8, United States v. Williams, 4 Cranch C. C. 372.

9, Atchison v. Morris, 11 Fed. Rep. 582, summons in civil actions served on non-resident witness; Brooks v. Farwell, 4 Fed. Rep. 166, party attending suit in another state.

§ 672. Depositions in equity trials.—

Originally the federal courts on the chancery side, following the ancient equity procedure, caused the depositions of witnesses to be taken before examiners or commissioners appointed by the court. The examination was upon written interrogatories and cross-interrogatories prepared by the solicitors of the parties or by the court; and the testimony was not made public until the time came, under the rules of practice, for its publication or inspection.¹ But, by the modern practice, testimony in courts of equity *may be taken orally*. Under the practice now generally adopted, either party may give notice to the other that he desires the evidence to be adduced in the cause to be taken orally; and thereupon all the witnesses will be examined before an examiner of the court or one specially appointed. The examination takes place in the presence of the parties and their counsel; and the witnesses are subject to cross-examination and re-examination to be con-

ducted as near as may be as in the common law courts. The *examiner* is required to note all objections to the testimony, but has *no power to decide upon the competency, materiality or relevancy of questions.*² Testimony in equity cases may still be taken by written interrogatories and cross-interrogatories.³ It has been held proper to appoint a special examiner to take testimony beyond the territorial jurisdiction of the court;⁴ but in other cases this application has been denied.⁵ In case the testimony is taken in this mode, such reasonable *notice* of the time and place of the examination is given as the examiner may fix by order in each case.⁶ By the equity rules in the federal courts, when the testimony is to be taken orally, the *court may on motion assign a time* within which each party may take his evidence; and, unless a special order is made, three months after the cause is at issue is the time allowed for the taking of testimony.⁷

1, For an exhaustive treatment of the subject of this section see, 1 Dan. Chan. Prac. ch. 22.

2, Rule 67 Federal Rules of Practice in Equity; Desty Fed. Proc. rule 67 p. 1178.

3, See authorities last cited.

4, North Carolina Ry. Co. v. Drew, 3 Woods 691. But a court cannot grant a motion to take testimony in a foreign country, United States v. Parrott, 1 McAll. (U. S.) 447.

5, Arnold v. Chesebrough, 35 Fed. Rep. 16; Celluloid Manfg. Co. v. Russell, 35 Fed. Rep. 17.

6, Rule 67 Federal Rules of Practice in Equity; Desty

Fed. Proc. rule 67 p. 1180. Such notice is essential to their use, *Rhoades v. Selin*, 4 Wash. (U. S.) 715.

7, *Desty* Fed. Proc. rule 67 p. 1180, and rule 69 p. 1183.

§ 673. **Depositions under state statutes**
— **General mode of taking.**— No attempt will be made in this work to state in detail the rules which govern the taking of depositions under the statutes of the various states. These statutes are so widely different that it will only be practicable to mention some of the general rules which are applicable, in many jurisdictions, and to further illustrate, by decisions from the state courts, the subjects already discussed under the head of depositions in federal courts.¹ The practice quite generally prevails in the different states of taking depositions of witnesses who are outside the state upon a commission, issued in a manner somewhat similiar to that provided in the federal statutes and rules of court. The other mode of taking depositions on simple notice before officers designated by statutes, in analogy to the mode of taking *depositions de bene esse* in the federal courts, is also practiced in many states. This is the more common procedure where witnesses are within the state. In some states, however, commissions also issue for taking testimony within the state. It is also true that, by the practice of some jurisdictions, depositions are taken both outside the state and within the state on simple notice. This *notice* is most

frequently given by the attorneys or parties, but, according to other statutes, it must be given by the officer before whom the testimony is to be taken. The notice should give to the adverse party the requisite notice and the opportunity to appear and to examine the witness. Ordinarily by these provisions, depositions are to be taken after the commencement of the suit, or after the joining of issue, but frequently statutes, under specified conditions, allow them to be taken before suit has been commenced, or even allow them to be used upon a motion in the suit.

1, For the practice in each state the statutes of the jurisdiction must be consulted.

§ 674. Same, continued. — In some of the states, parties are not at liberty to take depositions *de bene esse* on mere notice, according to the usual mode. They are required, if the deposition is taken within the state, to file with the court an application or petition, setting forth the circumstances and showing that an order is necessary, stating the names and residences of the witnesses whose testimony is desired and such other facts as are prescribed in the statute. Thereupon the judge is required to grant an order for the examination of the witnesses, if an action is pending, and, under some circumstances, even though an action is not pending. The order requires the witnesses to appear before a

referee or other person named therein at a given time and place. It also fixes the time of service upon the attorney of the adverse party of a copy thereof, as well as of the affidavit on which it is granted. In other jurisdictions, no judicial order is required, but an affidavit must be served with a notice showing that the case is within the statute, and that a cause for taking the deposition exists. Obviously irregularities as to notice or other steps in these proceedings may be waived as in the case of other depositions. The statutes of the jurisdiction should be consulted, as compliance with their provisions is always essential to the use of depositions taken under them.

§ 675. Statutes to be complied with.— Since the statutes regulating the taking of depositions are in derogation of common law, they must be *substantially complied with*, and some of the decisions hold that there must be a *strict compliance* with the provisions of the statute.¹ For example, the notice must be given as required by the statute.² If the statute requires a written notice, it must be given,³ although a verbal notice is sufficient in the absence of such statute.⁴ The power of appointing a commissioner in another state is purely statutory; and, unless the parties consent, an appointment is unauthorized, unless provided for by statute.⁵ In like manner, if the statute provides that a return of

a deposition shall be made in a prescribed manner, the statute must be complied with.*

1, Corgan v. Anderson, 30 Ill. 95; Farmers' Bank v. Hathaway, 36 Vt. 539; Graham v. Whitely, 26 N. J. L. 254; Thompson v. Clay, 60 Mich. 627; Dawson v. Dawson, 26 Neb. 716, a certificate must show that the taking of the deposition was commenced on day named in notice.

2, McEwen v. Morgan, 1 Stew. (Ala.) 190; Carter v. McDaniel, 21 N. H. 231; Kingsbury v. Smith, 13 N. H. 109, the time and place, magistrate and names of parties should be given; Davis v. Davis, 48 Vt. 502, deposition held bad because the name of the magistrate was omitted; Robertson v. Campbell, 1 Overt. (Tenn.) 172, where the name of the witness was omitted.

3, Denning v. Foster, 42 N. H. 165. The rule is also illustrated in many of the cases cited below.

4, Ormsby v. Granby, 48 Vt. 44; Melton v. Rowland, 11 Ala. 732.

5, Baber v. Rickart, 52 Ind. 594; *In re Attorney*, 83 N. Y. 164.

6, Scott v. Horn, 9 Pa. St. 407.

§ 676. **How compliance with the statute is to appear.**—In numerous cases, it has been held that compliance with the terms of the statute must *appear upon the face of the deposition* in order to entitle it to admission.¹ There is another class of decisions, however, in which it is held that the proceedings of the commissioner or other officer taking the deposition may *be presumed to be regular*, unless the contrary appears.² According to this view, it is not necessary that a commissioner should, in his certificate, negative the existence of those facts which would

render him incompetent to take the deposition, such as the fact that he had an interest in the event of the suit,³ or that he was of kin to either party in the suit.⁴ So it has been held unnecessary to certify that the deposition was reduced to writing by the commissioner or some other disinterested person;⁵ or that the commissioner had taken the oath, when an oath was required by statute;⁶ or to set forth the form of the oath which had been administered, or that neither party was present at the execution of a commission, where the statute provides that a single party shall not be present.⁷

1, *Die v. Bailey*, 2 Cal. 383; *Williams v. Chadbourne*, 6 Cal. 559; *Collins v. Elliott*, 1 Harr. & J. (Md.) 1; *Williams v. Banks*, 5 Md. 198; *Bascom v. Bascom*, Wright (Ohio) 632. See also, *Collins v. Lowry*, 2 Wash. (Va.) 75; *Renick v. Willoughby*, 2 A. K. Marsh. (Ky.) 22.

2, *Horton v. Arnold*, 18 Wis. 212; *Halleran v. Field*, 23 Wend. 38.

3, *Stewart v. Townsend*, 41 Fed. Rep. 121; *Moore v. Booker*, 4 N. Dak. 543.

4, *Gregg v. Mallett*, 111 N. C. 74; *Moore v. Booker*, 4 N. Dak. 543.

5, *Winton v. Little*, 94 Pa. St. 64; *Bulwinkle v. Cramer*, 30 S. C. 153; *Horton v. Arnold*, 18 Wis. 212.

6, *Halleran v. Field*, 23 Wend. 38.

7, *Cross v. Barnett*, 61 Wis. 650; *Turner v. Hardin*, 80 Iowa 691; *Ford v. Cheever*, (Mich.) 63 N. W. Rep. 975.

§ 677. Same, continued.—The principle under discussion is well illustrated in a New York case where it was objected that the cer-

tificate of the officer did not state that the oath was publicly administered. Said Justice Cowen: "If that be not made by the statute an essential part of the certificate, then we ought to intend that it was administered publicly. These commissioners are, for the purpose of taking testimony under the statute, officers of the law, officers, it is true, with limited powers, like the inferior magistrate holding his court, but in favor of whom, when he returns that he administered a certain oath, required by statute, we intend that he administered it publicly, and even in proper form, unless he gave particulars or stated something from which it appears affirmatively that he departed from the statute. The common form of a jurat shows this. An officer certifies that the deponent was sworn before him on such a day; we intend that he was sworn in due form. It cannot, in the nature of things, be necessary for the commissioners to say that the witness was sworn in public, more than that he was sworn on the gospels, or that these were tendered to him, and he preferred some other form. On the whole as the statute has not required the commissioners to return expressly whether the oath was in public or private, we think that the return may be easily sustained by the doctrine of intendment."¹ But if the commissioner, instead of certifying that the witnesses were duly sworn, sets forth the

form of the oath administered, no other presumption arises; and, if a *substantial defect* thus *affirmatively appears* in this or in other respects, the *deposition should be excluded*.² The certificate of a commissioner that he had the authority to administer oaths is sufficient *prima facie* evidence of that fact.³

1, Halleran v. Field, 23 Wend. 38.

2, Telegraph Co. v. Collins, 45 Kan. 88; Cross v. Barnett, 61 Wis. 650; Lund v. Dawes, 41 Vt. 370; Call v. Perkins, 68 Me. 158; Elliot v. Hayman, 2 Cranch C. C. 678; Horne v. Haverhill, 113 Mass. 344.

3, McNeal v. Braun, 53 N. J. L. 617; Moore v. Willard, 30 S. C. 615.

§ 678. Notice of taking—Time.—There is little uniformity in the statutes of the different states respecting the notice of the taking of depositions. In some instances, statutes provide that a reasonable notice must be given. More frequently they prescribe the length of time of the required notice which is often made to depend upon the distance of the witnesses from the place of trial. It is a principle, very generally recognized, that a party has a right to have such notice that he may have an *opportunity*, according to the nature of the proceeding, either to *file cross-interrogatories* or to *orally cross-examine* the witnesses whose depositions are to be taken; and reasonable opportunity must be afforded him to exercise this right.¹ The full time prescribed by the statute must be allowed;

and the general rule of computation is that the first day is to be excluded and the last included.² So, the deposition cannot be taken later than the prescribed time, without notice to that effect.³ The taking of depositions is so far under the control of the court that, even though the exact statutory notice is given, the *court may by order grant indulgence* to the party on whom the notice is served, if the circumstances are such that he cannot act upon the notice.⁴ Where the statute does not in terms make the length of time of the notice dependent upon the number of miles or fix a different time, the court will inquire whether the adverse party could, by using the ordinary modes of travel, be present and procure the attendance of his counsel; and, in determining this question, the court will take *notice of the usual routes of travel*.⁵ So in determining this question and also the one whether the notice is reasonable, the circumstances of the particular case must be considered.⁶ In a recent case in Connecticut between subjects of the Chinese Empire, under a statute requiring "reasonable notice," a notice was served on the sixteenth day of March to take depositions in Shanghai on the seventeenth of May following; the notice was held insufficient. In determining whether the notice was reasonable, the court held that, although there was a sufficient number of days for taking the journey, this was only one of

many considerations which might properly be taken into account; that it was proper, among other things, to take into consideration the fact that the claim was a large one growing out of remote transactions, and that it might be difficult to find an attorney who could conduct the cross-examination. It was also held that *the question of reasonable notice* is so allied to the rules respecting the admission and rejection of testimony that it *can be reviewed in a court of error*.¹

1, Blair v. Bank of Tenn., 11 Humph. (Tenn.) 84; Stille v. Layton, 2 Har. (Del.) 149; Hartley v. Chidester, 36 Kan. 363.

2, Gooday v. Corlies, 1 Strob. (S. C.) 199; Arnold v. Nye, 23 Mich. 286; Masters v. Warren, 27 Conn. 293; Fant v. Miller, 17 Gratt. (Va.) 187; Collins v. Richart, 14 Bush (Ky.) 621.

3, Dawson v. Dawson, 26 Neb. 716; Peterson v. Albach, 51 Kan. 150; Bennett v. Bennett, 37 W. Va. 396. See also, Mix v. Baldwin, 156 Ill. 313.

4, Toulman v. Swain, 47 Mich. 82.

5, Hipes v. Cochran, 13 Ind. 175; Carlisle v. Tuttle, 30 Ala. 613; Manning v. Gasharie, 27 Ind. 399.

6, Attwood v. Fricot, 17 Cal. 37; 76 Am. Dec. 567; Harris v. Brown, 63 Me. 51; Green v. Tally, 39 S. C. 338; Trevelyan v. Lofft, 83 Va. 141; Stephens v. Thompson, 28 Vt. 77.

7, Sing Cheong Co. v. Yung Wing, 59 Conn. 535. See secs. 656, 657 *supra*.

§ 679. **Same—Names of witnesses, officer, etc.**—The notice is often required by the statute to state the place of taking the depo-

sition, the names of the witnesses and the name of the person or officer before whom the deposition is to be taken, and in such case, these requirements of the *statute must be complied with*.¹ Such provisions are inserted in the statute in order that the adverse party may determine whether he will attend the taking of the deposition, and, if he so determines, that he may have such information as will enable him to attend and prepare for the cross-examination.² *Under other statutes* or rules of procedure, the *names* of the witnesses or of the officer *need not be stated*. Even where the statute prescribes these requisites, and requires that the time and place of taking the deposition and the names of the witnesses shall be stated, *slight mistakes*, not likely to mislead the other party, *do not vitiate* the notice.³ If the statute provides that the notice shall be a due notice or such as is reasonable, much will be left to the *discretion of the court*, but one which requires exertions much beyond the usual mode of traveling is not a compliance with the statute.⁴ It is a common practice for the notice to state that the deposition will be taken at a time and place stated and continued from time to time until completed. In such case, the *hearing may be adjourned* from time to time until the deposition is finished.⁵ When the *notice is indefinite* as to the day on which the deposition is to be taken, or mentions a

number of different days in such manner that the adverse party is not specifically notified of the time, it is insufficient.⁶

1, Minot v. Bridgewater, 15 Mass. 492; Pilmer v. Bank, 16 Iowa 321. But if the notice states that the names of the witnesses are not known, they may still be examined under the notice, if properly identified, Hemenway v. Knudson, 73 Hun 227; Wade Notice sec. 1227.

2, Minot v. Bridgewater, 15 Mass. 492.

3, Rand v. Dodge, 17 N. H. 343, mistake as to day of week held immaterial where rest of the date was correct. Slight mistake in name of commissioner is not fatal, Friend v. Thompson, Wright (Ohio) 636; County of Green v. Bledsoe, 12 Ill. 267; Kellum v. Smith, 39 Pa. St. 241. Error as to name of the court, being well known to counsel, is not fatal, Matthews v. Dare, 20 Md. 248. Pape v. Wright, 116 Ind. 502, where the full name of the witness was not given, the notice being served without objection then made.

4, Harris v. Brown, 63 Me. 51; Shropshire v. Dickinson, 2 A. K. Marsh. (Ky.) 20; Water's Heirs v. Harrison, 4 Bibb (Ky.) 87; Kincaid v. Kincaid, 1 J. J. Marsh. (Ky.) 100. Five days' notice, where the distance was eighty-three miles, was held *prima facie* reasonable, Dean v. Tygert, 1 A. K. Marsh. (Ky.) 172. One day's notice, where the distance was two miles, held reasonable, M'Ginley v. M'Laughlin, 2 B. Mon. (Ky.) 302. Ten days' notice, where the distance was one hundred and sixty-six miles, was held good, Harris v. Brown, 63 Me. 51.

5, Kelley v. Martin, 53 Kan. 380; Weeks Dep. 288. See also, sec. 715 *infra*.

6, Reardon v. Farrington, 7 Ark. 364; Caldwell v. McVicar, 9 Ark. 418; Jordan v. Hazard, 10 Ala. 225.

§ 680. Notice — On whom served.—The statutes often prescribe that service of the notice may be made either upon the party or his attorney. When *service upon parties* is

relied on, the service should be *upon all* adverse parties, for the deposition cannot be used against those not notified of the taking.¹ But it has been held that, if the action is against *co-partners*, service of the notice on one partner is sufficient.² Where notice is served upon the *attorney*, it should be upon the attorney of record, or at least upon one who has acted as attorney in the cause;³ and where an attorney has withdrawn from a case and is no longer attorney of record, service on him is clearly bad.⁴ So it has been held that service of a notice on a station agent of a railway company who had no authority in the matter in question is not a legal or sufficient notice.⁵

1, *Clap v. Lockwood*, Kirby (Conn.) 100; *McConnell v. Stettinius*, 2 Gilm. (Ill.) 707. But see, *Spaulding v. Ludlow Woolen Mill*, 36 Vt. 150; *Ellis v. Lull*, 45 N. H. 419. Statutes requiring service on the party must be complied with, *Brown v. Ford*, 52 Me. 479. The same is true, if the statute requires service on the attorney, *Griffith v. Gruner*, 47 Cal. 644. Service on the husband, even if he appears, does not bind the wife who is a party and not served with notice, *Danforth v. Bangor*, 85 Me. 423.

2, *Cox v. Cox*, 2 Port. (Ala.) 533.

3, *Brown v. Ford*, 52 Me. 479. But information that an attorney had withdrawn from the action does not invalidate a notice served while such person remains attorney of record, *Herrin v. Libbey*, 36 Me. 350. Service on attorneys, not of record, but who had appeared and conducted the case is good, *King v. Ritchie*, 18 Wis. 554.

4, *King v. Ritchie*, 18 Wis. 554.

5, *Atchison, T. & S. F. Ry. Co. v. Sage*, 49 Kan. 52†

§ 681. **Same — Place of taking.**—The notice should so state or describe the place of taking the deposition that the adverse party or his attorney can, by the use of reasonable diligence, attend and be present at the examination.¹ While slight errors in the name of the place, or in failing to accurately describe the place are not grounds for 'suppressing the deposition,' yet if the errors or omissions are so serious that the place cannot be identified or that the other party is misled, the deposition should not be received.² But a notice that *several depositions* will be taken *at the same time* at different places, so far apart that the party or attorney cannot be present at both, is bad,³ although it has been held in such cases that the party may elect which examination he will attend, and have the other deposition suppressed.⁴

1, Crozier v. Gano, 1 Bibb (Ky.) 257; Harris v. Hill, 7 Ark. 452; 46 Am. Dec. 295; McClintock v. Crick, 4 Iowa 453.

2, Owens v. Kinsey, 6 Jones (N. C.) 38; Gibson v. Gibson, 20 Pa. St. 9; Taylor v. Shemwell, 4 B. Mon. (Ky.) 575; Ridge's Orphans v. Lewis, 1 Tayl. (N. C.) 536; Moore v. Booker, 4 N. Dak. 543; Vawter v. Hultz, 112 Mo. 633.

3, Alston v. Taylor, 1 Hayw. (N. C.) 381.

4, Water's Heirs v. Harrison, 4 Bibb (Ky.) 87.

5, Wytheville Ins. & B. Co. v. Teigers, 90 Va. 277; Fant v. Miller, 17 Gratt. (Va.) 187; Evans v. Rothschild, 54 Kan. 747. But see, Nolan v. Johns, 126 Mo. 159.

1682. Mode of taking—Reducing to writing.—Depositions should be reduced to writing by the commissioner or magistrate, or by some person acting for him and in his presence.¹ Unless the irregularity is waived, a deposition should not be received which has been reduced to writing *in the absence of the commissioner* or magistrate, although the witness appears before him and subscribes and swears to it.² It should be the object in taking the depositions of witnesses to obtain their answers to the questions propounded, uninfluenced by suggestions from parties or attorneys. That end is far better attained by having the entire proceeding conducted in the presence of the officer than by any practice which permits the *statements* of the witness to be *prepared in advance*.³ The answers of the witness may be reduced to writing by himself in the presence of the commissioner or magistrate,⁴ but this cannot be done by a party to the suit or by his attorney, unless the objection is waived.⁵ In modern practice, depositions are quite generally taken in the presence of the commissioner or other officer by a *stenographer*, and afterwards reduced to long hand. In such cases, it is generally stipulated that this course may be taken, and the signature of the witness is waived. In the absence of any stipulation or waiver, it is not a compliance with statutes or rules requiring the deposition to be

reduced to writing by the commissioner or by the witness to have the writing done by a third person.⁶ But the fact that the deposition is in *typewriting* raises no presumption that it was not reduced to writing by the proper officer;⁷ and, if officially signed by the notary and the witness, it cannot be objected to on that ground.⁸ From the discussion in another section, it is evident that an irregularity in the mode of taking down or reducing the deposition to writing is one which the court would readily infer to have been *waived* by the other party, if present, or if timely objection be not made.⁹

1, Tuthill Springs Co. v. Smith, 90 Iowa 331.

2, Foster v. Foster, 20 N. H. 208; McEntire v. Henderson, 1 Pa. St. 402; Grayson v. Bannon; 8 Watts (Pa.) 524.

3, Fant v. Miller, 17 Gratt. (Va.) 187; Logan v. Steele, 3 Bibb (Ky) 230, where it is held that the fact that the deposition has been reduced to writing elsewhere is waived, if known to the other party and not objected to; it is also waived by cross-examining the witness.

4, Carlyle v. Plumer, 11 Wis. 96.

5, Snyder v. Snyder, 50 Ind. 492; Hurst v. Larpin, 21 Iowa 484; Steele v. Dart, 6 Ala. 798.

6, East Tenn. Ry. Co. v. Arnold, 89 Tenn. 107. See also, Stoddard v. Hill, 38 S. C. 385.

7, Behrensmeyer v. Keitz, 135 Ill. 591.

8, Stoddard v. Hill, 38 S. C. 385.

9, See secs. 687 *et seq. infra*.

§ 688. **Interpreters.**—It is common practice for the officers taking the deposition to

make use of an interpreter when the witness does not understand the language. But this is not necessary where the commissioner himself understands the language of the witness.¹ If the record shows that an interpreter acted, it should also appear that he was duly sworn as interpreter.² If it appears that the interpreter acted unfairly,³ or that his services were dispensed with in such manner that the testimony could not be properly or fairly taken, the deposition may be suppressed.⁴ The testimony may be reduced to writing in the language in which it is given and interpreted at the trial.⁵

1, *Scheineor v. Russell*, 83 Tex. 83.

2, *Amory v. Fellowes*, 5 Mass. 219.

3, *Euberweg v. La Compagnie Generale Transatlantique*, 35 Fed. Rep. 530.

4, *Schiaffino v. The Jacob Brandow*, 33 Fed. Rep. 160.

5, *Cavasos v. Gonzales*, 33 Tex. 133; *Kuhtman v. Brown*, 4 Rich. L. (S. C.) 479.

§ 684. Persons competent to take depositions.— "In the absence of statutory provisions, anyone may act who has attained the age of citizenship, who is of sound mind, not disqualified by crime, and who stands indifferent between the parties in the cause in which the testimony is required. He must bear such relation to the parties as will secure his impartiality in the execution of the commission. He, in other words, should

not, directly or indirectly, bear to either party such relation as would authorize a presumption of a bias in the execution of the trust in favor of or against either party. In the absence of all prescription of fitness or qualification, it is necessary to the ends of justice, and required by the character of the trust devolved upon him."¹ In determining the competency of the commissioner or officer, it is obvious that the *language of the statute or rule of court* of the jurisdiction must also be taken into consideration.² The person designated as *commissioner need not be an official*,³ but statutes sometimes provide that the persons taking depositions shall be a judge of court, a notary, justice, commissioner or other officer. There is a general concurrence in the view that the one who takes a deposition should entertain no such relation to the parties or the cause as to be under any temptation to act unfairly. He should be so *free from bias* that, in the performance of his duties, there will be no other motive than to elicit the exact truth from the witness, and to reduce the statements to writing in an absolutely impartial manner. The principal difference to be found in the cases where the subject has been discussed is that, in one class of decisions, the courts have suppressed depositions taken before those related to the party or in any way interested in the result, while in the other class, the courts

have not inferred that any injury had been caused from the mere proof of such relationship or interest, and have refused to suppress the depositions. The person authorized by the commission is the one who must act. He has *no right to delegate his authority.*⁴

1, Weeks Dep. sec. 284; Lord Moyston v. Spencer, 6 Beav. 135; Fricker v. Moore, Bunb. 289; Selwyn's Case, 2 Dick. 563; Newton v. Foot, 2 Dick. 793, where depositions were suppressed because the clerk of a solicitor in the cause had been employed as clerk to the commissioner.

2, A deposition taken before a brother-in-law of one of the parties was held inadmissible in Bryant v. Ingraham, 16 Ala. 116. The same is true of a deposition taken before an uncle, Bean v. Quimby, 5 N. H. 94; or before an agent or attorney of the party in the same action, Whicher v. Whicher, 11 N. H. 348; Williams v. Rawlins, 33 Ga. 117; or before a remote relative, Call v. Pike, 66 Me. 350; or before a magistrate who was a law partner of one of the parties, Dodd v. Northrop, 37 Conn. 216. The rule is the same where the officer was surety for the costs of the party offering the deposition, Floyd v. Rice, 28 Tex. 341. When the deposition was before a justice, a son-in-law of a party to the action, it was held that he was not interested in the event of the action, no fraud or unfairness being shown, Chandler v. Brainard, 14 Pick. 285. See also, Wood v. Cole, 13 Pick. 279. So a deposition was admitted, although the magistrate had his office with the attorney representing a party, Singer Manfg. Co. v. McAllister Bros., 22 Neb. 359. See also, M'Dowell v. Van Deusen, 12 Johns. 356; Bellows v. Pearson, 19 Johns. 172.

3, Semmens v. Walters, 55 Wis. 675.

4, Maryland Ins. Co. v. Bossiere, 9 Gill & J. (Md.) 121.

§ 685. Comity between states.—Where a commissioner is appointed by the governor

of one state to take depositions in another state, he is an officer only of the state under whose authority he is appointed, and is allowed by the comity and the legislation of the other state to exercise his powers there.¹ The courts of the state in which the commissioner acts will lend their aid to compel the attendance of a witness; and in resisting an order to attend, the witness can not question the jurisdiction of the court which issued the commission.² Such commissioner does not, however, have the implied authority to employ counsel, either to instruct him in his duty or to look after the interests of a party to the controversy to which the deposition relates.³

1, *Lyman v. Hayden*, 118 Mass. 422. See also, *State v. Bourne*, 21 Ore. 218.

2, *State v. Bourne*, 21 Ore. 218. *In re Jenckes*, 6 R. L. 18.

3, *Lyman v. Hayden*, 118 Mass. 422.

§ 686. Mode of taking and returning depositions. — Generally, where a commission is to issue, the practice is somewhat similar to that in the federal courts which has already been described.¹ The interrogatories and cross-interrogatories are prepared by the respective parties on notice by the moving party, and in some states, if the interrogatories cannot be agreed upon, they are settled by the court or by a judge, and

are transmitted with the commission to the officer or person designated as commissioner. Statutes and rules of court in the several states generally prescribe the manner in which the persons taking the depositions shall execute their commission or otherwise perform their duties. Among the other requirements, the officer is generally directed to publicly administer an oath to each witness, and the form of such oath is sometimes stated; he is to propound all the interrogatories to the witness, and to carefully reduce the same to writing in his presence. Witnesses are generally required to subscribe their names to the deposition; and the officer is also required to subscribe his name, sometimes to each sheet of the deposition. After taking the deposition, the officer is generally directed to return the same, personally or by mail or express with exhibits attached, to the clerk of the court in which the action is pending, properly endorsed, together with his certificate showing that the statute has been complied with. From the illustrations given in other sections, it will be seen that the statutes and rules of court vary materially as to the form of these certificates. It will also be found that, while the provisions of such statutes must be substantially complied with, mere clerical omissions or mistakes are often disregarded.² It is to be borne in mind that the foregoing are only

the most general provisions, such as are common to the statutes or rules of court of many states, and that no attempt is made in this work to do more than state in the most general manner the methods of procedure in taking depositions.

1, See secs. 653, 665 *et seq. supra*.

2, See secs. 687 *et seq.*, 709 *infra*.

§ 687. Irregularities — As to names, etc.—In the discussion under the head of the federal statutes, we found that depositions are based upon statutes, and that, since the statutes are in derogation of the common law, their provisions must be substantially complied with; but that depositions are not necessarily rejected because of mere *technical irregularities*, mistakes or omissions, where it is obvious that no injustice has been done.¹ The same principle has been illustrated in a large number of decisions in the state courts. Thus, a deposition may be received, although the *case is wrongly entitled* in the notice, if the names of the witness are given and the circumstances are such that the opposing counsel must know the case intended.² In many cases depositions have been received, notwithstanding an error as to the *names of the witnesses* in the notice of taking, where there was such similarity of names as to easily cause mistake, and where the other party had not been misled to his injury;³ or where the

other party knew who was to be examined, and cross-examined the witness;⁴ or where the two names are *idem sonans*,⁵ or where the mistake of name was in the caption.⁶ But where the *mistake of name is substantial and material*, so that the name is clearly different, and the error has not been waived, it is fatal.⁷ Where the *mistake* or discrepancy in the name of a witness or party *in one paper or part of the deposition is corrected in another*, it will be disregarded.⁸ On the principle under discussion, the deposition may be received in evidence, although there is not exact correspondence between the *name of the commissioner* as stated in the commission and as it appears in his certificate and signature, or where there are other *slight mistakes in other names*.⁹ Thus, depositions have been received where a commission, issued to E. R. Clyde, was returned executed by Robert J. Clyde, and the attorney testified that the commissioner intended was Robert J. Clyde, whom he well knew, and that he was the only person by the name of Clyde in the town where the commission was executed;¹⁰ or where the name of the defendant is inaccurately given in the notice or other papers;¹¹ or where the commission only gives the individual name of the plaintiff, instead of his name in his representative capacity;¹² or where the name of the state is omitted from the caption;¹³ or where the caption contains

a clerical error as to the *date* of the taking,¹⁴ or where the witness by mistake, signs the deposition in the wrong place.¹⁵

1, See secs. 658, 662, 670 *supra*.

2, Mathews v. Dare, 20 Md. 248; Monteeth v. Caldwell, 7 Humph. (Tenn.) 13; Jordan v. Hazard, 10 Ala. 221, where the plaintiff's name was given as Robert G. instead of Rowland G.; Dixon v. Steele, 5 Hayw. (Tenn.) 28, where the names of the parties in the *dedimus* were incorrect, but it did not appear that there was any other suit between the parties.

3, International Ry. Co. v. Kindred, 57 Tex. 491, where the name was given as John McKay instead of John Macke; Kent v. Buck, 45 Vt. 18, where the deposition was signed, Emily A. P. instead of Mrs. I. V. P., as stated in notice, the witness being known as the wife of I. V. P.; Strayer v. Wilson, 54 Iowa 565, where there was only one christian name in the deposition, but the return showed two; Bibb v. Allen, 149 U. S. 481, where there was an error in the name of the commissioner.

4, Thompkins v. Williams, 19 Ga. 569.

5, Strayer v. Wilson, 54 Iowa 565.

6, Braley v. Braley, 16 N. H. 26, where the surname was omitted.

7, McCoy v. People, 71 Ill. 111; Strayer v. Wilson, 54 Iowa 565; Scholes v. Ockerland, 13 Ill. 650; Patterson v. Wabash Ry. Co., 54 Mich. 91, where the name was given as James Horan instead of Patrick Horan; Glenn v. Gleason, 61 Iowa 28, where it was Sallie E. McK. instead of S. M. K.

8, Kendall v. Limberg, 69 Ill. 355; Ellis v. Spaulding, 39 Mich. 366, where the name was wrong in the commission, but corrected in interrogatories.

9, Byington v. Morse, 62 Iowa 470, where a commission issued to Fred Remley and signed by F. A. Remley was sustained on the presumption that the commission was sent to Fred Remley, and, since it had been returned by some one, there was sufficient similarity between the names to infer that the same person returned it.

10, *Foierson v. Irwin*, 4 La. An. 277; *Bibb v. Allen*, 149 U. S. 481, where the name of the commissioner was given as Carey instead of Corey; *Sparks v. Sparks*, 51 Kan. 195, where his name was given as Dan Ray instead of Daniel E. Wray.

11, *Mann v. Birchard*, 40 Vt. 326; *Kellum v. Smith*, 39 Pa. St. 241, where the christian name was omitted. Contra, *McClintock v. Crick*, 4 Iowa 453; *McCandless v. Polk*, 10 Humph. (Tenn.) 617, where the name of the commissioner was omitted in the blank and filled in by him.

12, *Reese v. Beck*, 24 Ala. 651.

13, *Atkinson v. Starbuck*, 6 Blackf. (Ind.) 353.

14, *Jones v. Smith*, 6 Iowa 229.

15, *Read v. Patterson*, 11 Lea (Tenn.) 430; *Mobley v. Hamit*, 1 A. K. Marsh. (Ky.) 590, where a deposition was received, though not signed by the witness.

§ 688. Same — Other irregularities. — Other illustrations of irregularities that have been held so immaterial as not to affect the admissibility of depositions are those where the commissioner fails to subscribe each sheet of the deposition as required by a rule of court, there being no suspicion that the deposition has been tampered with;¹ or where the deposition had been properly addressed and endorsed, but delivered to the court in some other manner than through the mail;² or where the commission was forwarded to the witness instead of the commissioner, the commission having been delivered to the officer, and the deposition in other respects having been properly taken, and no prejudice having been shown;³ or where the deputy clerk of

the court, instead of the clerk, received the interrogatories from the post office;⁴ or where the answers to the interrogatories were returned in the same sealed envelope, but not attached, there being no suggestion of fraud, or that the deposition had been tampered with;⁵ or where the clerk of the court, required by the statute to have the custody of the deposition, allowed it to be taken out of the office to be copied;⁶ or where the name of the commissioner and that of the witness were interchanged;⁷ or where the return contained a misrecital, by the commissioner, of the court from which the commission issued, the mistake being shown by the commission itself;⁸ or where the deposition was wrongly endorsed by the clerk of the court receiving it,⁹ or not marked by him as filed.¹⁰ On the same principle, such mere clerical omissions or mistakes in the certificate or return of the officer or in the caption, as raise no inference of fraud or that there has been a failure to comply in substance with the statute or rule of court, are often disregarded.¹¹

1, *Chadwick v. Chadwick*, 59 Mich. 87.

2, *Locke v. Tuttle*, 41 Mich. 407. See also, *Scripture v. Newcomb*, 16 Conn. 588, where the deposition was addressed to the supreme court instead of the superior court.

3, *Phelps v. Walkey*, 84 Iowa 120.

4, *Louisville Ry. Co. v. Chaffin*, 84 Ga. 519.

5, *Downs v. Hawley*, 112 Mass. 237. See also, *Street v. Andrews*, 115 N. C. 417.

6, *Harris's Appeal*, 53 Conn. 492, there being no proof

that the other party had been injured thereby. The contrary rule was adopted where an attorney, without order of the court, sent the deposition back to be corrected, *Creager v. Douglas*, 77 Tex. 484.

7, *Eastman v. Bennett*, 6 Wis. 228.

8, *Louisville Ry. Co. v. Chaffin*, 84 Ga. 519.

9, *Hobendobler v. Lyon*, 12 Kan. 276.

10, *Moran v. Green*, 21 N. J. L. 562; *Summers v. Wallace*, 9 Watts (Pa.) 161.

11, *Kidder v. Blaisdell*, 45 Me. 461; *Payne v. West*, 99 Ind. 390; *Rand v. Dodge*, 17 N. H. 343; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267; *Scott v. Perkins*, 28 Me. 22; 48 Am. Dec. 470; *Rhees v. Fairchild*, 160 Pa. St. 555, seal omitted; *Hard v. Brown*, 18 Vt. 87; *Borders v. Barber*, 81 Mo. 636, single word of prescribed form omitted; *Semmens v. Walters*, 55 Wis. 675, residences of witnesses omitted in caption; *Sanford v. Spence*, 4 Ala. 237, hour of day when deposition taken, not stated; *Kendall v. Limberg*, 69 Ill. 355, mistake in the name of the clerk issuing the commission; *Lewis v. Morse*, 20 Conn. 211, certificate did not state that deponent signed the deposition, but this fact appeared from inspection. But where the hour of taking the deposition was wrongly stated, the deposition was not admitted, *Kean v. Newell*, 1 Mo. 754; 14 Am. Dec. 321.

1689. Waiver of objections.—It is a familiar rule that defects in the notice or in other steps incident to the taking of a deposition may be waived, either by the acts of the parties or by express stipulations. Thus, if a party or his attorney *appears and cross-examines a witness*, this is a waiver of all defects in the notice or of the fact that no notice has been served. This rule rests upon the ground that, when a person avails himself of the privileges which a notice is designed

to give, he ought not to be heard to say that he has had no notice.¹ When a *deposition* is taken pursuant to verbal agreement at the time and place agreed upon, and the person taking it relies on such agreement, the other party waives his objection to the want of notice, whether he attends at the taking or not.² The same is true where the deposition is taken against the objection of a party, but pursuant to a notice given by him.³ The same principle has been applied when a party appears and takes part in the proceedings by objecting to the competency of testimony,⁴ or has the *hearing continued* to give him time to file cross-interrogatories.⁵ The mere *presence of a party* at the taking of a deposition, even when he makes no objection, has in several cases been held a waiver of irregularities in the manner of taking it.⁶ The *right to object* that a witness was not sworn at the proper time,⁷ or in the proper manner;⁸ or that an answer is not responsive to the question,⁹ or that his testimony given is in narrative form¹⁰ is waived by the failure to object by the party present at the taking of the deposition. One who examines a witness, making no objection to his competency, waives the right to do so afterwards.¹¹

1, *Rogers v. Wilson*, Minor (Ala.) 407; 12 Am. Dec. 61; *Doe v. Brown*, 8 Blackf. (Ind.) 443; *Nevan v. Roup*, 8 Iowa 207; *Ryan v. People*, (Col.) 40 Pac. Rep. 775; *Benham v. Purdy*, 48 Wis. 99; *Cameron v. Cameron*, 15 Wis. 1. See sec. 663 *supra*.

2, *Ormsby v. Granby*, 48 Vt. 44. So where there is consent to the issuing of a commission, the party cannot object that it was irregularly issued, *Cherry v. Baker*, 17 Md. 75; *Wilkinson v. Ward*, 42 Ill. App. 541.

3, *Crabb v. Orth*, 133 Ind. 11.

4, *Miller v. McDonald*, 13 Wis. 673, the rule is the same, though the preliminary objection was also made that there had been no notice.

5, *Hobart v. Jones*, 5 Wash. 385.

6, *Fry v. Coleman*, 1 Grant (Pa.) 445; *Wertz v. May*, 21 Pa. St. 274; *Long v. Straus*, 124 Ind. 84; *Kea v. Robeson*, 4 Ired. Eq. (N. C.) 427. Contra, *Bacon v. Rogers*, 8 Allen 146. But the mere presence of a party's attorney who takes no part in the proceedings is no waiver of a want of authority appearing on the face of the certificate, *Harris v. Wall*, 7 How. 693.

7, *Armstrong v. Burrows*, 6 Watts (Pa.) 266.

8, *Northern Pac. Ry. Co. v. Urlin*, 158 U. S. 271.

9, *Brown v. Mitchell*, 75 Tex. 9.

10, *Myers v. Murphy*, 60 Ind. 282. The rule is the same where the objection is that an interrogatory is too general, *International Ry. Co. v. Prince*, 77 Tex. 560.

11, *Weil v. Silverstone*, 6 Bush (Ky.) 698; *Barnhardt v. Smith*, 86 N. C. 473.

1690. Same — Objections to the authority of the commissioner.—On the same principle stated in the last section, one who cross-examines witnesses cannot object to the competency of one of the commissioners to act;¹ and the filing of cross-interrogatories, without objection to the failure to give notice of the name of the commissioner, will be deemed a waiver of such objection.² An objection to the commissioner on the ground

that he is not a proper person to take the deposition, if known to the party or his attorney, is waived, if not made when the deposition is taken,³ or if the witness is cross-examined.⁴ On the same principle, by consent of the parties, a commission may be issued in blank, leaving the name of the commissioner to be inserted when the deposition is taken.⁵ So where each party has a right to name a commissioner, a party who neglects to do so will be deemed to have consented to have the deposition taken before the commissioner named by the opposite party.⁶ In a New York case, a witness on cross-examination was asked to annex certain letters; the witness annexed abstracts of such letters only. It was held, when objection was made at the trial, that the deposition should be received on the principle that where there has been an opportunity to correct an imperfect execution of a commission, either by ordering a re-execution or quashing the return, no objections, because of such imperfect execution, should be heard on the trial;⁷ and where parties join in executing a commission, they waive the fact that no order for a commission has been made, in other words, they waive the want of authority of the commissioner to act.⁸

1, *Douge v. Pierce*, 13 Ala. 127.

2, *Aicardi v. Strang*, 38 Ala. 326. So it waives the filing of an affidavit for the commission, *Pickard v. Bates*, 38 Ill. 40.

3, *Edmunds v. Griffin*, 41 N. H. 529.

- 4, Crowther v. Rowlandson, 27 Cal. 376.
- 5, Carlyle v. Plumer, 11 Wis. 96.
- 6, Billingslea v. Smith, 77 Md. 504.
- 7, Wright v. Cabot, 89 N. Y. 570.
- 8, Rich v. Lambert, 12 How. 347; Crowther v. Rowlandson, 27 Cal. 376.

§ 691. **When objections are to be made.**—When depositions are read in evidence without objection, it is then too late to object to their competency. As in the case of oral testimony, a party should not be heard to object to evidence after he has waited to observe its effect upon the court and jury, and after his failure to make objection may have prevented the other party from supplying the defect.¹ It does not follow, however, that all objections to questions must be made at the time of taking the deposition. It is a rule, which has often been declared, that *objections to the form of a deposition or to the competency of the witness* must be taken before the case is called for trial, but that objections to the substance may be made during the trial.² It is a rule of quite general application that *mere objections to form*, for example, that the questions are leading, should be made at the time of taking the deposition or at least within a reasonable time before the case is called for trial, or they will be deemed waived.³ In some cases, the strict rule is adhered to that

this objection should be made at the time the question is propounded, or not at all.⁴ *If a party is not present* at the time of taking a deposition, he may make such objections *within a reasonable time* after the return of the deposition.⁵ If the testimony is taken *on commission*, objections to the form should be made before or at the time the commission issues.⁶

1, *Lisbon v. Bath*, 23 N. H. 1; *Francis v. Ocean Ins. Co.*, 6 Cow. 404; *Northern Pac. Ry. Co. v. Urlin*, 158 U. S. 271.

2, *Bibb v. Allen*, 149 U. S. 481; *Frink v. McClung*, 9 Ill. 569; *Doane v. Glenn*, 21 Wall. 33; *Winslow v. Newlan*, 45 Ill. 145; *Doane v. Glenn*, 1 Col. 495; *Hill v. Smith*, 6 Tex. Civ. App. 312.

3, *Alverson v. Bell*, 13 Iowa 308; *Keeney v. Chilis*, 4 G. Greene (Iowa) 416; *Mumma v. McKee*, 10 Iowa 107; *Whipple v. Stevens*, 22 N. H. 219; *Willey v. Portsmouth*, 35 N. H. 303; *Crowell v. Western Reserve Bank*, 3 Ohio St. 406; *Davidson v. Wallingford*, (Tex. Civ. App.) 30 S. W. Rep. 286.

4, *Rowe v. Godfrey*, 16 Me. 128; *Sheeler v. Speer*, 3 Binn. (Pa.) 130; *Glasgow v. Ridgeley*, 11 Mo. 34.

5, *McCandlish v. Edloe*, 3 Gratt. (Va.) 330.

6, *Overton v. Tracey*, 14 Serg. & R. (Pa.) 311; *Hill v. Canfield*, 63 Pa. St. 77; *Chambers v. Hunt*, 22 N. J. L. 552; *Adams v. Wadleigh*, 10 Gray 360; *Potter v. Tyler*, 2 Met. 64; *Winslow v. Newlan*, 45 Ill. 145; *Polleys v. Ocean Ins. Co.*, 14 Me. 141.

1692. Mere general objections.—A mere general objection extends only to the relevancy, competency or legal effect of the testimony, and will not be considered to extend to any matter of form or to any ques-

tion of regularity or authority in respect to the taking of the deposition.¹ For example, such an objection does not raise the point that the question is leading, and will not be so limited.² Nor does it suffice to object in general language that the deposition has not been taken pursuant to the provisions of the statute,³ or that the evidence is secondary.⁴ When objections are made upon specific grounds, all other objections than those enumerated are waived.⁵

1, *Crary v. Barlow*, 5 Ark. 2110. See secs. 896 *et seq. infra*.

2, *Kansas Ry. Co. v. Pointer*, 9 Kan. 620; *Parsons v. Huff*, 38 Me. 137.

3, *Bulwinkle v. Cramer*, 30 S. C. 153.

4, *Cook v. Orne*, 37 Ill. 186; *Ward v. Whitney*, 3 Sandf. (N. Y.) 399; *Ward v. Whitney*, 4 Seld. (N. Y.) 442; *Heirs of Tevis v. Armstrong*, 71 Tex. 59.

5, *Morse v. Cloyes*, 11 Barb. (N. Y.) 100; *Agee v. Williams*, 30 Ala. 636; *Potts v. Coleman*, 86 Ala. 94; *Commercial Bank v. Union Bank*, 11 N. Y. 203.

§ 693. **Renewal of objections — Waiver.** — It is not sufficient to make an objection to testimony at the time of settling the interrogatories, or at the time of taking the deposition on oral questions. The *objection must be renewed* at the trial and brought to the attention of the court.¹ But if it appears that a motion to suppress a deposition has been made before the trial, and the objection overruled, no renewal of the objection is neces-

sary.¹ *If a party allows a deposition to be read once without objections to any informality or irregularity in the taking, of which he has knowledge, thereafter he can only raise objections to the competency of the witness or to the subject matter.*² In such case, the party is held to have waived those objections or defects which might have been remedied, if timely objection had been made.³ Thus, depositions which have been read in the court below, without objection, cannot be rejected in the appellate court.⁴ Nor can the question of want of notice be first raised in the appellate court;⁵ and a deposition which has been read on a former trial of the same action should not be rejected for want of proof of notice.⁷ So other formal objections, not raised at the former trial, will be disregarded on such second trial;⁸ and a stipulation that a deposition taken in another suit may be used in that in which the stipulation is made extends to the latter.⁹

1, *Valentine v. Middlesex Ry. Co.*, 137 Mass. 28; *Black v. Lamb*, 12 N. J. Eq. 108; *Looper v. Bell*, 1 Head (Tenn.) 373; *Northern Pac. Ry. Co. v. Urlin*, 158 U. S. 271.

2, *Cross v. Barnett*, 61 Wis. 650.

3, *Randolph v. Woodstock*, 35 Vt. 291; *Thomas v. Kinsey*, 8 Ga. 421; *Bartlett v. Hoyt*, 33 N. H. 151.

4, *Ray v. Smith*, 17 Wall. 411; *Northern Pac. Ry. Co. v. Urlin*, 158 U. S. 271. See also cases last cited.

5, *Johnson v. Rankin*, 3 Bibb (Ky.) 86; *Armstrong v. Mudd*, 10 B. Mon. (Ky.) 144; 50 Am. Dec. 545; *Hodges v.*

Nance, 1 Swan (Tenn.) 57; Whitley v. Davis, 1 Swan (Tenn.) 333.

6, Dill v. Camp, 22 Ala. 249.

7, Hill v. Meyers, 43 Pa. St. 170.

8, Bartlett v. Hoyt, 33 N. H. 151.

9, United States Exp. Co. v. Jenkins, 73 Wis. 471.

1694. Objections to the substance—

When made.—It may be implied from the statements already made that those objections which do not relate to matters of form, but which attack the competency or credibility of the witness, or the materiality of the testimony, may be made at the trial. Although this rule has been declared in the judicial decisions of some states, in other states, it is the subject of statutory regulation.¹ In order that an objection, even to the competency or relevancy of a deposition, should be effective, it should be *specific*, and addressed to those parts which are objectionable. A *mere general objection* to the deposition does not reach the defects, as it may be good in part, and bad in part; and the objection should be limited to the part which is objectionable.² If the objections are to *interrogatories on commission*, the rule that the objection must be specific applies, for the reason that the adverse party is entitled to the opportunity to change the form of the *interrogatories*.³ As in the case of oral testimony, *objections* may be made *to the answers* as

well as to interrogatories. For example, a witness may volunteer improper statements or make an answer wholly irresponsible to the question. In such case, either party may object to the answer and move to strike it out at the time of taking the deposition, or move to suppress that part of the deposition.⁴ It is not, as a rule, the duty of commissioners or other persons taking depositions to perform the judicial function of passing upon the relevancy of testimony or the competency of witnesses. He should note the objections, and leave those questions to be determined by the court.⁵ It will be found in some jurisdictions that the statutes regulate the duty of the officer in this regard.

1, *Leavitt v. Baker*, 82 Me. 26; *Horseman v. Todhunter*, 12 Iowa 230; *Kingsbury v. Moses*, 45 N. H. 222. But see, *Dunbar v. Gregg*, 44 Ill. App. 527; *Rockford Ins. Co. v. Farmers' State Bank*, 50 Kan. 427, by statute. See secs. 896 *et seq. infra*.

2, *Commercial Bank v. Union Bank*, 11 N. Y. 203; *Day v. Ragnet*, 14 Minn. 273. See secs. 896 *et seq. infra*.

3, *Allen v. Balcock*, 15 Pick. 56; *Whitaker v. Sigler*, 44 Iowa 419; *Stebbins v. Duncan*, 108 U. S. 32; *Taylor v. Strickland*, 37 Ala. 642.

4, *Hazelton v. Union Bank of Columbus*, 32 Wis. 34; *Lee v. Stowe*, 57 Tex. 444; *Greenman v. O'Connor*, 25 Mich. 30; *Nones v. Northouse*, 46 Vt. 587; *Shepard v. Pratt*, 16 Kan. 209; *Stepp v. National Life & Maturity Assn.*, 37 S. C. 417.

5, *Carpenter v. Dame*, 10 Ind. 125; *Hill v. Sherwood*, 3 Wis. 343.

§ 695. **Statutory provisions as to objections.**—In most of the states, statutory provisions or rules of court will be found regulating, to some extent, the time or mode of making objections to depositions. Many of the decisions which have been cited in this chapter have depended upon statutes of this character. It will be found that such provisions quite generally require that objections to the competency or the capacity of the witness, or to the competency or relevancy of the testimony shall be made when the deposition is produced at the trial, as if the witness testified at the trial. These statutes are generally so framed as to deny, either impliedly or by express language, the right to make objections to the form of the questions, unless such objections are made before the trial, although in a few instances the statutes permit such objections as to form, when the party had not attended the taking of the deposition. In a few states, objections to the form of questions must be filed in writing before the trial, and these objections in such case are required to be passed upon by the court before the commencement of the trial. It is obviously impracticable, in a work of this character, to do more than call attention in the most general manner to these statutory provisions, leaving it to the practitioner to examine the statutes and rules of court which regulate the subject at the place of trial.

§ 696. Depositions not admissible unless cause therefor continues.— Evidence by deposition on the trial of a common law action is of a secondary character, and is, therefore, encountered by the rule that forbids the use of such evidence where that which is better exists, and is in the power of the party. Oral testimony in the presence of the court and jury is more satisfactory evidence than a deposition of the same witness; and, when it is practicable, parties should in general be compelled to resort to it.¹ Hence, when the deposition is taken under such circumstances that the inability to procure the personal attendance of the witness may be merely temporary, there should be *proof that the cause for taking the deposition has continued.*² Thus, where the deposition is taken on account of the temporary *illness* of a witness, and the trial does not take place until a considerable time has elapsed, it should be shown, in order to admit the deposition, that the disability has continued.³ So where the deposition is taken on the ground that the witness was *about to leave the state*, it should appear that the purpose was carried out and that the witness has remained absent so that his personal attendance could not be obtained in the ordinary manner.⁴ The principle under discussion was applied in a case where the deposition of a *witness residing out of the state* had been taken. He came into the court

room during the trial, remained in the place where court was held and was there when his deposition was offered. He had not been subpoenaed by either party, and no explanation was made of the failure to call him as a witness. It was held that the deposition was inadmissible.⁵ On the same principle, when the deposition of a *witness within the state* is taken on the ground that he resides more than thirty miles, or some other distance prescribed by statute, from the place of trial, and the witness who still resides at that distance is present in court when his deposition is offered, the court is authorized to reject the deposition, and, in numerous cases, such depositions have been rejected as inadmissible.⁶ In other jurisdictions, it has been held admissible to read a deposition properly taken, although the witness happens to be in court, leaving it to the other party to examine him orally.⁷ It has been held a proper exercise of judicial discretion to refuse to receive the deposition of a plaintiff taken by a defendant before the trial, when offered by the defendant, the plaintiff being in court and having fully testified.⁸

1, Thayer v. Gallup, 13 Wis. 539; Schmitz v. St. Louis, I. M. & S. Ry. Co., 119 Mo. 256; East Tenn., V. & G. Ry. Co. v. Kane, 92 Ga. 187, where this rule was applied, even when the adverse party procured the attendance of the witness.

2, Jackson v. Rice, 3 Wend. 180; 20 Am. Dec. 683; Emlaw v. Emlaw, 20 Mich. 11; Weed v. Kellogg, 6 McLean (U. S.) 44; Memphis Ry. Co. v. Maples, 63 Ala. 601.

3, *Sax v. Davis*, 71 Iowa 406.

4, *Commercial Bank v. Whitehead*, 4 Ala. 637; *Morgan v. Halverson*, 9 Wis. 271; *Goodyn v. Lloyd*, 8 Port. (Ala.) 237, but if the witness dies before leaving the state, the deposition may be admitted. The deposition will not be rejected merely because the witness may have been in the state at some time between its taking and the trial, *Johnson v. Sargent*, 42 Vt. 195.

5, *Mobile Ins. Co. v. Walker*, 58 Ala. 290; *Chicago, K. & W. Ry. Co. v. Prouty*, 55 Kan. 503. See also cases cited in next note.

6, *Thayer v. Gallup*, 13 Wis. 539; *Stiles v. Bradford*, 4 Rawle (Pa.) 394; *O'Connor v. Andrews*, 81 Tex. 28; *Ables v. Miller*, 12 Tex. 109; 62 Am. Dec. 520; *Sergeant v. Adams*, 1 Tyler (Vt.) 197; *Schmitz v. St. Louis, I. M. & S. Ry. Co.*, 119 Mo. 256; *Haward v. Barron*, 38 N. H. 366; *East Tenn., V. & G. Ry. Co. v. Kane*, 92 Ga. 187; *Phenix v. Baldwin*, 14 Wend. 62, non-resident witness. It has been held error to receive the deposition of a witness residing in the county, without proof that his attendance cannot be had, *Chicago Ry. Co. v. Brown*, 44 Kan. 384; *Frankhauser v. Neally*, 54 Kan. 744; *Willard v. Mellor*, 19 Col. 534; *Munro v. Callahan*, 41 Neb. 849.

7, *Frink v. Potter*, 17 Ill. 406; *Ford v. Ford*, 11 Humph. (Tenn.) 89; *Barton v. Trent*, 3 Head (Tenn.) 167; *Thayer v. Gallup*, 13 Wis. 539, where the practice was not approved, but held to be discretionary with the court. In *O'Connor v. Andrews*, 81 Tex. 28, it was also held a matter of judicial discretion.

8, *Grigsby v. Shwarz*, 82 Cal. 278. See also, *Johnston v. McDuffee*, 83 Cal. 30.

§ 697. Same—Modifications of the rule—Statutes.—It will be found that most of the decisions excluding depositions, when the attendance of the witness could have been obtained, are based to some extent upon statutes thus limiting the use of depositions.

Where the statute provided that the deposition could be read in evidence "when the witness was not produced in court," it was held that, since the deposition had been properly taken, it could be read in evidence although the witness had been in court on the day of the trial, as it was not shown that he was "produced in court" at the time the deposition was read, or that his absence was due to any fault of the party who offered the deposition.¹ Under another statute providing for the taking of a deposition of any witness, and that it should be read at the trial, subject nevertheless to the right of either party to require the personal attendance and *viva voce* examination of the witness whose deposition had been taken, it was held that, after he had been examined at the trial, the deposition could be read.²

1, Louisville Ry. Co. v. Hubbard, 116 Ind. 193; McFarland v. United States Mut. Acc. Assn., 124 Mo. 204.

2, McLawrin v. Wilson, 16 S. C. 402.

§ 698. Continuance of the cause—

How inferred.—Where it is shown that cause existed for taking the deposition, it may be *inferred from circumstances*, such as from the age of the witness,¹ or from the nature of the illness or infirmity and the short lapse of time,² or from the distance of his residence from the place of trial,³ or from other pertinent facts that it is not practicable to

obtain the attendance of the witness or *that the cause still continues*. Testimony, that inquiries had been made at the former place of business of an alleged absent witness, as well as at other places, and of various people who had known him, and that they had said they did not know where he was, but understood that he was in another state, is sufficient proof of absence.⁴ When the deposition is taken on the ground that the witness resides outside the state, it will be *presumed*, until the contrary appears, that such *non-residence continues*.⁵ In one jurisdiction, the rule has been declared that, if the legal cause for taking the deposition no longer exists at the time of trial, the proof to exclude it must come from the adverse party.⁶ But a different rule prevails in other jurisdictions, where it is held that the *burden* of proving such facts rendering the deposition admissible is upon the party offering it in evidence.⁷ The rule under consideration does not exclude a deposition taken on sufficient grounds, if subsequently and before the trial, the *witness has become unable to testify* by reason of death, sickness or other cause,⁸ or when the witness was incompetent at the time of taking the deposition, but has since been made competent by statute,⁹ or where the nature of a stipulation for the taking the testimony is such as to remove the objection,¹⁰ or by the fact that the adverse party has procured the attendance

of the witness at the trial, and discharged him before the deposition is offered.¹¹

1, Pollard v. Lively, 2 Gratt. (Va.) 216, age and ill health; Worthy v. Patterson, 20 Ala. 172. See also, Ails v. Sublet, 3 Bibb (Ky.) 204. See also, Jackson v. Rice, 3 Wend. 180; 20 Am. Dec. 683, where it was held that inability from age alone would not be presumed.

2, Clark v. Dibble, 16 Wend. 601; Beitler v. Study, 10 Pa. St. 418. In these cases the proof showed that the witnesses were in an advanced state of pregnancy.

3, Barnhardt v. Smith, 86 N. C. 473; Bronner v. Frauenthal, 37 N. Y. 166; McCutcheon v. McCutcheon, 9 Port. (Ala.) 650; Gelly v. Singleton, 3 Litt. (Ky.) 250; Hennessey v. Niagara Fire Ins. Co., 8 Wash. 91, absence from jurisdiction.

4, Reuton v. Monnier, 77 Cal. 449.

5, Pharr v. Bachelor, 3 Ala. 237; Gelly v. Singleton, 3 Litt. (Ky.) 250.

6, Logan v. Monroe, 20 Me. 257.

7, Atkinson v. Nash, 56 Minn. 472; Fry v. Bennett, 4 Duer (N. Y.) 247.

8, Tift v. Jones, 74 Ga. 469, where the witness was present at the trial, but, by reason of sickness, his memory had been affected; Goodwyn v. Lloyd, 8 Port. (Ala.) 237, where the witness had been prevented from leaving the state by his death; Henry v. Northern Bank, 63 Ala. 527, mental incapacity.

9, Vauscoy v. Stinchcomb, 29 W. Va. 263.

10, Estep v. Larsh, 21 Ind. 183.

11, Shirts v. Irons, 37 Ind. 98.

§ 699. Use in other actions. — The use of depositions as evidence is not necessarily limited to the action in which they are taken. On the contrary, if a second action is brought

between the same parties or their representatives in interest, in which the *issues* are substantially *the same*, depositions, properly taken in the former action, may, by the order of the court, be used in the latter.¹ For example, a deposition taken in an action of *assumpsit*, since discontinued, may be read in an action for fraudulent representation between the same parties and brought in the same court.² So the deposition of a testator, taken in a suit between himself and his children, was admitted, on a contest of his will by some of the children whom he had disinherited, to show the cause of his estrangement from them.³ A deposition taken in a former ejectment case between the same parties and relating to the same land may be read.⁴ On the same principle, a deposition admissible in the *original suit* is also admissible upon the hearing of a *cross-bill*, filed after it was taken under an order, afterwards entered, that all depositions taken in the original suit should be read in evidence in the cross-suit, subject to the same exceptions.⁵ Although an *order of court* is generally obtained when it is desired to use depositions taken in another action, the practice prevails in some jurisdictions of allowing such depositions to be read without an order or notice of their intended use.⁶

1, Haupt v. Henninger, 37 Pa. St. 138; Brooks v. Cannon, 2 A. K. Marsh. (Ky.) 525; Taylor v. Bank of Ill., 7

T. B. Mon. (Ky.) 576; Heth v. Young, 11 B. Mon. (Ky.) 278; Briggs v. Briggs, 80 Cal. 253, where the statutes on the subject are liberally construed; Stewart v. Register, 108 N. C. 588, where an order of court was held unnecessary.

2, Woolenslagle v. Runals, 76 Mich. 545.

3, Chaddick v. Haley, 81 Tex. 617.

4, Weertz v. May, 21 Pa. St. 274, the former action having resulted in a nonsuit, it was held to make no difference.

5, Smith's Ex. v. Profitit's Adm., 82 Va. 832.

6, Adams v. Raigner, 69 Mo. 363; Stewart v. Register, 108 N. C. 588; Searle v. Richardson, 67 Iowa 170, where it was held necessary to file the depositions in the second action, and to obtain leave to use them.

§ 700. Use of depositions on second trial.—If a deposition has been taken and used on a former trial, it may be read on a second trial of the same action when the cause for the taking continues, or when the witness has died before the second trial.¹ In an action where it was stipulated that the plaintiff's deposition might be used on the trial of the cause, the plaintiff testified on the first trial and the deposition was not read; at the second trial, the plaintiff was absent, and it was held that the deposition was admissible.² Where a cause was remanded from the federal to the state court, it was held that depositions taken while the action was pending in the federal court might be received.³ Depositions are not to be rejected for the reason that, subsequent to their taking, the *pleadings* have been materially

amended, if the issues remain substantially the same.⁴ But if *new parties* are joined, the depositions taken before the joinder cannot be read against such new parties.⁵

1, Chase v. Springvale Mills Co., 75 Me. 156; Wisdom v. Reeves, (Ala.) 18 So. Rep. 13.

2, *Ex parte* Priest, 76 Mo. 229, where it was held that the fact that a deposition had been taken in a former suit did not excuse the witness from testifying in the second suit.

3, Missouri Pac. Ry. Co. v. White, 80 Tex. 202.

4, Anthony v. Savage, 3 Utah 277.

5, Jones v. Williams, 1 Wash. (Va.) 230; Kerr v. Gibson, 8 Bush (Ky.) 129; Dalsheimer v. Morris, (Tex. Civ. App.) 28 S. W. Rep. 240.

§ 701. Issues and parties to be substantially the same.—It is to be borne in mind that depositions taken in other actions are not to be received in evidence, unless the parties are the same or in privity, and unless the issues are substantially the same. To admit evidence of such character would deprive the party against whom the deposition is offered of the right of notice, and of the right to attend and cross-examine the witness.¹ Thus, where a husband and wife were each injured on a ferryboat at the same time and by the same cause, the deposition of the husband taken in an action by the wife against the ferry company for the injury to herself, in which he was plaintiff only by reason of being her husband, was not received in an action by the wife, as his administra-

trix, against the company for the injury to him.² So a deposition of a person, since deceased, as to the execution of a note, taken for the purpose of proving up the claim before the executors, is not admissible in a suit subsequently brought against the executors upon the note, as, with respect to such suit, it is *res inter alios*.³ The same principle was applied in an action brought against a bank and its cashier, when the action was dismissed as against the cashier before the trial, and when the deposition of the cashier, taken in another action between the bank and a third party, was offered in evidence. It was there held that, since the cashier was not a party, the deposition could not be received for any other purpose than to contradict him as a witness after laying the proper foundation therefor.⁴ Since the competency of the deposition taken in the former suit depends upon the fact that the adverse party, or those in privity with him, had the opportunity to cross-examine the witness, if it appears that the deposition was taken without authority, or without the sanction of an oath, or *without such chance of cross-examination*, it should not be received, although, if due notice was given, it is not necessary that any cross-examination should have actually been made.⁵ It is very clear that depositions of the character under discussion should be admitted when, at the time of the second trial, the

witness whose testimony is offered *is dead or beyond the jurisdiction of the court*. It has sometimes been declared that depositions taken in a former suit will not be admitted, although the parties and issues are the same, unless there are some peculiar reasons, and unless some cause is shown for not bringing the witnesses into court or for taking their depositions again.⁶ But in many of the cases we have cited, no such limitation is mentioned. It is hardly necessary to add that depositions taken in former cases may be *used to contradict a witness* or to show the *admission* of a party on the same principle that oral statements of like character may be shown.⁷

1, Doane v. Glenn, 1 Col. 495; Borders v. Barber, 81 Mo. 636; Tappan v. Beardsley, 10 Wall. 427; Sewall v. Robbins, 139 Mass. 164; Camden Ry. Co. v. Stewart, 21 N. J. Eq. 484; Southern White Lead Co. v. Hass, 73 Iowa 399; Nelson v. Harrington, 72 Wis. 591.

2, Fearn v. West Jersey Ferry Co., 143 Pa. St. 122. The rule is the same in an action by a father for loss of services of his son, where the former action was by the son, Nelson v. Harrington, 72 Wis. 591.

3, Choate v. Huff, (Tex. App.) 18 S. W. Rep. 87.

4, Bartelott v. International Bank, 119 Ill. 260; Kerr v. Gilson, 8 Bush (Ky.) 129, same principle.

5, Fitzgerald v. Fitzgerald, 3 Swab. & T. 397; Steinkeller v. Newton, 1 Scott N. R. 148; 9 Car. & P. 313; Tayl. Ev. secs. 465, 466 and cases cited.

6, O'Harra's Heirs v. Hunt, 19 Ohio 460.

7, Heirs of Holman v. Bank, 12 Ala. 369; Heth v. Young, 11 B. Mon. (Ky.) 278; Nelson v. Harrington, 72 Wis. 591.

§ 702. Control and use of depositions.

When a deposition has been taken and filed, it becomes subject to the *control of the court*. It is not under the ownership or control of either party to the exclusion of the other, nor can either party be compelled to make use of the deposition, if he does not elect to do so.¹ This rule applies to the direct as well as to the cross-examination.² If a deposition has been taken on the interrogatories of both parties, and is withheld by the commissioner at the request of the one at whose instance it was taken, the court will, on application, *issue an order for its return*. It is not in the discretion of the court to refuse such an order, because the testimony may have been unfavorable, or a surprise to one of the parties.³ Although there is some authority to the contrary, it follows as a natural consequence of the rule already stated, that a party may use as evidence a deposition relevant to the issue, *although taken by the adverse party*. This rule is the same whether the evidence was given as answers to the direct or the cross-examination.⁴ Under such circumstances, the deposition may be read, although the party so offering it had no notice of the taking. He has the right to waive that requisite.⁵ A party has the same legal *right to read a deposition, regularly taken and filed by the other party*, that he would have to introduce a witness summoned by such party.⁶

The principal objection which has been made to the practice of allowing a person to use a deposition taken by the adverse party is that, if either party is allowed first to use a deposition taken by the other, the party taking it is deprived of the right of cross-examination.⁷ In answer to this, it may be said that the general presumption is that the testimony of a witness will be in favor of the party calling him, and therefore the right of cross-examination ordinarily belongs to the opposite party; and if the witness should prove hostile, it would be proper to treat him at the time of taking the deposition as such witnesses are treated on their oral examination.⁸

1, *Elliot v. Shultz*, 10 *Humph. (Tenn.)* 234. It has been held that a deposition can not be used in evidence if taken from the files and kept until the trial, *Collins v. Shafer*, 78 *Hun* 512. See secs. 668 *supra*, 712 *infra*.

2, *Williams v. Kelsey*, 6 *Ga.* 365; *Watson v. Race*, 46 *Mo. App.* 546.

3, *First Nat. Bank v. Forest*, 44 *Fed. Rep.* 246.

4, *Nash v. State*, 2 *G. Greene (Iowa)* 286; *McClintock v. Curd*, 32 *Mo.* 411; *Weber v. Kingsland*, 8 *Bosw. (N. Y.)* 415; *Oconnor v. American Iron Co.*, 56 *Pa. St.* 234; *Juneau Bank v. McSpedon*, 15 *Wis.* 629; *Memphis & C. Packet Co. v. Pickey*, (*Ind.*) 40 *N. E. Rep.* 527.

5, *Yeaton v. Fry*, 5 *Cranch* 335.

6, *Hazelton v. Union Bank of Columbus*, 32 *Wis.* 45; *Echols v. Staunton*, 3 *W. Va.* 574; *Brandon v. Mullenix*, 11 *Heisk. (Tenn.)* 446. When the deposition of a witness is taken by both parties, either party may use both depositions, *Woodruff v. Garner*, 39 *Ind.* 246.

7, *Sexton v. Brock*, 15 Ark. 345. See also the cases cited above.

8, *Juneau Bank v. McSpedon*, 15 Wis. 629. See also the cases cited above. See sec. 817 *infra*.

§ 703. Use of portions of depositions.

When a deposition relates to distinct transactions and is not used by the party in whose behalf it was taken, the other party may be permitted to introduce parts of the deposition relating to one or more of such transactions, although he declines to offer it as to others; but he should not be permitted to introduce such a part of the testimony with reference to a particular transaction as is favorable to him, and reject those portions which are unfavorable.¹ Applying the principle more broadly, there would seem to be no objection to allowing either party to read such parts of depositions as are relevant and relate to any distinct transaction, leaving it to the other party to offer the remainder of the deposition, if he desires.² It is clear that, *when parts of a deposition are so read, the other party may introduce such portions as relate to the same subject and tend to explain that which has been read.*³ When a person uses the *deposition of the adverse party*, he thereby makes the testimony his own, and is estopped from claiming that the portion read is incompetent evidence;⁴ and the party who has taken the deposition may object to his interrogatories, if the deposition is used by the

adversary.³ So it has been held that one who has taken a deposition which he does not use is not debarred from introducing evidence to impeach the witness, if the deposition is used by the other party.⁴ It is obvious that a deposition does *not* become *relevant* or admissible for one party, *merely because it has been taken by the other party*, unless the testimony would otherwise be material or relevant. Thus, where a deposition was taken to impeach the character of a witness, but was not used, and the character of the witness was not otherwise assailed, the adverse party had no right to use the deposition, although it would have been otherwise, if the witness had been attacked on the trial.⁵

1, Citizens' Bank v. Rhutasel, 67 Iowa 316.

2, Van Horn v. Smith, 59 Iowa 142; Calhoun v. Hays, 8 Watts & S. (Pa.) 127; 42 Am. Dec. 275; Gellatly v. Lowery, 6 Bosw. (N. Y.) 113; Converse v. Meyer, 14 Neb. 190. But see, Thomas v. Miller, 151 Pa. St. 482; Southwark Ins. Co. v. Knight, 6 Whart. (Pa.) 327; Grant v. Pendery, 15 Kan. 236, where a party refused to read the cross-examination after reading the direct examination of his own witness, and it was held proper to strike out the part read and to instruct the jury to disregard the same. See sec 168 *supra*.

3, Whitman v. Money, 63 N. H. 448.

4, Jewell v. Center, 25 Ala. 498; Fountain v. Ware, 56 Ala. 558; Texas & P. Ry. Co. v. Gay, (Tex.) 30 S. W. Rep. 543.

5, Hatch v. Brown, 63 Me. 410.

6, Elliott v. Schultz, 10 Humph. (Tenn.) 234. Contra, Jordon v. Jordan, 3 Thomp. & C. (N. Y.) 269.

7, Sullivan v. Norris, 8 Bush (Ky.) 521.

§ 704. Suppression of depositions.—

A common mode of objecting to the validity of a deposition is by a motion for its suppression, that is, to have it declared by the court to be wholly inadmissible and of no effect. Since the taking of depositions is a proceeding, subject to the control of the court, such *motion* may be made, even *before the taking* of the deposition, when the objecting party desires to raise the question whether the notice is sufficient or whether the proceeding is regular in other respects. Much *more frequently*, however, the motion is made *after the return* of the deposition and before the trial. We have seen that objections to interrogatories or evidence, or to any of the proceedings incident to the taking of depositions may be waived, if they are not made before the trial. On the principle that such objections, when made at the trial, are too late to admit of the correction of errors which might otherwise be remedied, the courts generally refuse to entertain motions to suppress depositions, unless they are made *before the trial*.¹ It is to be remarked, however, that the suppression of a deposition is a matter resting to a considerable extent in the *discretion of the court*;² and, in some jurisdictions, such motions will be entertained at the trial.³ But it should be noted that those *objections which relate to the materiality of the testimony* should be raised at the trial; and depositions will not,

as a rule, be suppressed before trial on that ground, unless it is clear that the testimony can under no contingency become relevant.⁴

1, *Spence v. Mitchell*, 9 Ala. 744; *Graydon v. Gaddis*, 20 Ind. 515; *Goodland v. LeClair*, 78 Wis. 176; *Howard v. Stillwell*, 139 U. S. 199. But see, *Hazlett v. Gambold*, 15 Ind. 303; *Stull v. Howard*, 26 Ind. 456; *Wall v. Williams*, 11 Ala. 826. In *Morgan v. Wing*, 58 Ala. 301, it was held too late to object after the jury was selected. See also, *Glenn v. Clare*, 42 Ind. 60, where the same rule was declared, where the defect did not appear in the deposition; *Bank v. Travers*, 4 Biss. (U. S.) 507, it was held to be too late, where the deposition had been on file three years; *Palms v. Richardson*, 51 Mich. 84, where notice of filing was given, but no motion to suppress had been made before the trial; *Edwards v. Heuer*, 46 Mich. 95, same rule where there was irregularity in certificate; *In re Nobles Estate*, 22 Ill. App. 535, same rule where appellant's counsel moved to open the deposition, and then moved to suppress it because not properly inclosed.

2, *Semmens v. Walters*, 55 Wis. 675; *Smith v. Groneweg*, 40 Minn. 178; *Gorman v. Minneapolis & St. L. Ry. Co.*, 78 Iowa 509.

3, *Adams Express Co. v. McConnell*, 27 Kan. 238, where a motion was entertained on the day before trial.

4, *Pittsburgh Ry. Co. v. Theobald*, 51 Ind. 246; *Tays v. Carr*, 37 Kan. 141.

§ 705. Grounds for suppression.—It has become a well recognized practice to suppress a deposition when the objection is brought to the attention of the court with reasonable diligence, and it is established that the same was taken under such circumstances that its use would tend rather to pervert, than to aid the administration of jus-

tice.¹ It is a well established rule that a deposition may be attacked by proof that it was *taken unfairly or without authority of law*. Under statutes providing that the answer shall be written down by the officer, it has been held good ground for suppression that the answers of the witness had been secretly prepared for him by an attorney or other person in advance;² or that the witness never signed the deposition, or that he was personated by another;³ or that the deposition or the part sought to be suppressed is wholly hearsay;⁴ or where it appears that the statements were not made on the knowledge of the witness, and that he had evaded stating the means of his knowledge;⁵ or where the notices have been so served that the adverse party or his attorney could not have a reasonable opportunity to cross-examine the witness,⁶ or where no commission had been issued to the officer.⁷

1, See cases and illustrations already cited.

2, *Fisk v. Tank*, 12 Wis. 276. The same rule has been laid down where the witness adopts answers already made by him, given in a private deposition, *Greening v. Keel*, 84 Tex. 326.

3, *Lord v. Horsey*, 5 Har. (Del.) 317.

4, *Atwell v. Lynch*, 39 Mo. 519; *Rooker v. Rooker*, 83 Ind. 226.

5, *Chisholm v. Beaver Lake Lumber Co.*, 33 Ill. App. 253.

6, *Cole v. Hall*, 131 Mass. 88, several depositions taken at the same time, although the statutory notice was given

7, Western Union Tel. Co. v. Haman, 2 Tex. Civ. App. 100.

§ 706. Same — Where party is deprived of right of cross-examination. —

It is clearly within the power of the court to suppress a deposition, when it appears that the moving party has been *deprived of his right to cross-examine* the witness by any misconduct of the witness or the party, or by the sickness or death of the witness.¹ If, however, the cross-examination was postponed by consent of the parties, whereby the objecting party has lost the right to cross-examine the witness by reason of his death, and his own lack of vigilance, there is no ground for suppression.² And if the *testimony* is *substantially complete* and the deposition duly signed and certified, it should not be suppressed because a question or two on cross-examination has not been answered. Said Chief Justice Shaw on this subject: "No general rule can be laid down in respect to unfinished testimony. If substantially complete, and the witness is prevented by sickness or death from finishing his testimony, whether *viva voce* or by deposition, it ought not to be rejected, but submitted to the jury with such observations as the particular circumstances may require. But if not so far advanced as to be substantially complete, it must be rejected."³

1, Hewlett v. Wood, 67 N. Y. 394; Forrest v. Kissam, 7 Hill 464. See also, City of Chadron v. Glover, 43 Neb. 732.

2, Forrest v. Kissam, 7 Hill 464.

3, Fuller v. Rice, 4 Gray 343.

§707. **Same—Refusal of witness to answer.**—The *refusal* of a witness to *answer* substantially a proper and material interrogatory, either in the answer thereto or elsewhere in the deposition, is *sometimes held ground for suppressing the deposition*.¹ But, as to the last proposition, a contrary rule has been declared by high authority on the ground that a party should not be punished for the misconduct of his witness, but that the witness, in such cases, should be punished for contempt of court.² While the refusal to answer or the evasion of a question in answers may be so gross as to indicate the corruption of the witness and to justify the suppression of the entire deposition, this practice should not be resorted to, unless the perversity or wilfulness of the witness is manifest, although those answers which are evasive or not responsive may be stricken out.³ Nor will the questions, which a party refuses to answer when his deposition is taken, be deemed to have been confessed, unless such refusal was wilful.⁴ Clearly a deposition should not be suppressed for failure to answer an immaterial question,⁵ or for mere ambiguity in the answer, where there has been no attempt to

make the answer clear by cross-examination,⁶ or if the facts called for can be ascertained from other parts of the deposition,⁷ or if it is evident that the other party could not be prejudiced by the omission,⁸ or if the cross-interrogatory is impertinent,⁹ or if the testimony was taken in the presence of the attorney for the opposite party, who made no objection at the time on this ground.¹⁰

1, Chase v. Kenniston, 76 Me. 209; Harris v. Miller, 30 Ala. 221; Hadra v. Utah Nat. Bank, 9 Utah 412; Fulton v. Golden, 28 N. J. Eq. 37; Simpson v. Smith, 27 Kan. 567; Smith v. Griffith, 3 Hill 333; Shelton v. Paul, (Tex. Civ. App.) 27 S. W. Rep. 172. See also, Kimball v. Davis, 19 Wend. 437; Robertson v. Melasky, 84 Tex. 559. I all material questions are answered in a latter part of the deposition, it should not be suppressed, Tedrove v. Esher, 56 Ind. 443.

2, Keller v. Goodrich Co., 117 Ind. 556.

3, Trowbridge v. Sickler, 54 Wis. 306, where the witness had not been pressed to make more exact answers, the suppression of the deposition was refused. See also, Stratford v. Ames, 2 Allen 577; Robinson v. Boston Ry. Corp., 7 Allen 393.

4, Rushing v. Willis, (Tex. Civ. App.) 28 S. W. Rep. 94

5, Bullard v. Lambert, 40 Ala. 204; Savage v. Birkhead, 20 Pick. 167; Cohen v. Oliver, (Tex. Civ. App.) 29 S. W. Rep. 81; White v. Solomon, (Mass.) 42 N. E. Rep. 104.

6, Olds v. Powell, 10 Ala. 393.

7, Goodrich v. Goodrich, 44 Ala. 670.

8, Semmens v. Walters, 55 Wis. 675; Stone v. Evans, 32 Minn. 243.

9, Asker v. Demond, 103 Mass. 318.

10, Kimball v. Davis, 19 Wend. 437.

§ 708. **Suppression for non-compliance with statute.** — Depositions are sometimes suppressed on the ground that there has been a *substantial failure to comply with the statutory regulations*, as where the caption fails to identify the witness and the certificate fails to state that the answers were signed and sworn to by the witness;¹ or where a deposition is unsealed, and a sealing is required by the statute;² or on the ground that the commission was not executed by the proper person;³ or that due notice of the taking was not given;⁴ or that notice was served when the cause was not properly in court;⁵ or that a paper has been improperly substituted for another;⁶ or that the deposition was taken after the death of the plaintiff and before the substitution of an administrator;⁷ or that the deposition had been returned into court unsealed, not permanently fastened together, and that the fastenings had been removed.⁸

1, Emberson v. McKenna, 4 Tex. App. 137.

2. *In re* Thomas, 35 Fed. Rep. 337; Travers v. Jennings, 39 S. C. 410.

3, Newton v. Porter, 69 N. Y. 133, where it was held that the motion must be made with due diligence.

4, Hartley v. Chidester, 36 Kan. 363; State v. Jones, 2 Har. (Del.) 393.

5, Joy v. Aultman Co., 11 Bradw. (Ill.) 413.

6, Carter v. Manning, 7 Ala. 851.

7, *Kershman v. Swhela*, 59 Iowa 93. But see, *Matson v. Melchor*, 42 Mich. 477.

8, *Gage v. Brown*, 125 Ill. 522.

§ 709. Depositions not suppressed for mere irregularities.— It may be inferred from what has already been stated that depositions will not be suppressed on account of mere irregularities which do not amount to substantial departures from the statute or which do not so affect the taking or use of the deposition as to work injustice in the case. Thus, the courts have refused to suppress depositions when not returned within the time limited by the rule of court, owing to a mistake of the commissioner;¹ or when the notary taking the deposition failed to affix his seal, there being a certificate of his official character by the clerk of the proper court;² or where the certificate of the commissioner failed to show that the deposition was taken between the hours named in the commission, but recited that the witness had appeared on the day named in the commission;³ or where the deposition was not taken at the time and place stated in the notice, but where the party objecting had by consent afterwards cross-examined the witness;⁴ or even where it was taken after the time fixed by the court, when at the request of the adverse party;⁵ or where the deposition, when received, was open at one end presenting the

appearance of having been worn in the mail;⁶ or where the commissioner did not examine all the witnesses named in the commission;⁷ or where the deposition by mistake was directed to an officer of the wrong county;⁸ or where the deposition was not filed until after the time fixed;⁹ or where there was a mistake in designating the capacity in which the plaintiff sued or the name of a party, the defect being supplied in other parts of the commission, and it appearing that the adverse party had not been misled.¹⁰

1, *Smith v. Cokefair*, 8 Pa. Co. Ct. Rep. 45.

2, *Curtis v. Curtis*, 131 Ind. 489; *Rachac v. Spencer*, 49 Minn. 235.

3, *Sanford v. Spence*, 4 Ala. 237; *Sayles v. Stewart*, 5 Wis. 8. See also, *Semmens v. Walters*, 55 Wis. 675.

4, *Southern Kan. Ry. Co. v. Robbins*, 43 Kan. 145; *Sayles v. Stewart*, 5 Wis. 8.

5, *Mix v. Baldwin*, 156 Ill. 313.

6, *Eiffert v. Crops*, 44 Fed. Rep. 164. But if there are serious irregularities, such deposition will be excluded, *Smith v. Moody*, 94 Ga. 534.

7, *Schunior v. Russell*, 83 Tex. 83.

8, *Irvin v. Bevil*, 80 Tex. 332.

9, *Tuthill Springs Co. v. Smith*, 90 Iowa 331.

10, *Buckner v. Stewart*, 34 Ala. 529; *Jordan v. Hazard*, 10 Ala. 221; *Parsons v. Boyd*, 20 Ala. 112.

§ 710. Suppression of parts of depositions.—Parts of a deposition, material to the issue, will not be suppressed, although other

portions may be incompetent and immaterial.¹ The deposition will not be rejected as a whole because improper questions were asked. The objection should be made to the particular questions, and, if not so taken, it is waived.² Those answers which are not responsive should be stricken out on motion.³ Under a motion to suppress one part of a deposition, a party cannot on appeal obtain a suppression of an other part on another ground.⁴

1, Ramsey v. Flannagan, 33 Ind. 305.

2, Higgins v. Wortell, 18 Cal. 330. See sec. 711 *infra*.

3, Lee v. Stowe, 57 Tex. 444; Nones v. Northouse, 46 Vt. 587; Shepard v. Pratt, 16 Kan. 209, where a deposition was suppressed because the witness gave his conclusions rather than the facts.

4, Hanks v. Van Garder, 59 Iowa 179.

§ 711. Same—Miscellaneous.—The mere fact that *a witness has read the questions* before he answered them is not sufficient ground for suppressing the deposition. But the fact that a deposition is thus taken may greatly affect the credibility of the witness, since by reading the questions in advance he is enabled to prepare for the cross-examination in a manner not contemplated by the general rules of procedure.¹ The same rule was applied where the attorney of a party, at the request of the witness and before the taking of the deposition, wrote down the statement of the witness substantially as he after-

ward testified in answer to the interrogatories.² It has been held no ground for suppressing a deposition that the officer taking it occupied the same room with an attorney of one of the parties, or even that he was himself an attorney for one of the parties in other cases;³ or that *erasures* and interlineations exist, unless there is reason to suppose that the deposition has been tampered with.⁴ Portions of a deposition should not be suppressed before the trial as irrelevant, unless it is clear from the nature of the issue that the proposed testimony cannot be relevant.⁵ On motion to suppress, the *objection* to the deposition *must be definite*, and must point out the particular matters or defects which are relied on.⁶ Thus, if certain questions have not been answered or are leading, a mere general objection does not suffice on a motion to suppress, but the particular points relied on must be disclosed;⁷ and the motion will be confined to that portion of the deposition which is attacked.⁸

1, *Allen v. Seyfried*, 43 Wis. 414. Testimony should not be rejected merely because the witness consults with his attorney during cross-examination, *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434.

2, *Commercial Bank v. Union Bank*, 11 N. Y. 203.

3, *Burton v. Galveston Ry. Co.*, 61 Tex. 526; *Abbott v. Pearson*, 130 Mass. 191, where a person had advised a witness not to answer.

4, *Johnston v. Beckham*, 3 Grant Cas. (Pa.) 267.

5, *Corey v. Campbell*, 52 Ind. 157.

6, Whitaker v. Sigler, 44 Iowa 419; Howard v. Coleman, 36 Ala. 721. See the last section.

7, Gassen v. Hendrick, 74 Cal. 444; Neyland v. Beady, 69 Tex. 711; Commercial Bank v. Union Bank, 11 N. Y. 203. See secs. 896 *et seq. infra*.

8, Wallis v. Rhea, 10 Ala. 451.

§ 712. Amendments.—It is clearly within the power of the court, on application, to order the *return* of a deposition to the officer for the *correction* of mistakes; and, in some cases, *amendments* have been allowed at the trial. Thus, where a deposition was taken in another county of the state before a justice of the peace who had omitted to state in his certificate the name of the county in which the testimony was taken, and that he was not interested in the cause, he was permitted to appear before the court and amend his certificate.¹ So a commissioner was allowed to testify that the depositions were taken by and before him.² In another case, the officer had failed to affix the word "commissioner" to his signature; and, after the deposition was offered in evidence, it was returned to the commissioner and corrected, and notice of filing was served on the other party, after which it was received in evidence.³ Although the commissioner has no authority to amend the certificate after it has been filed, yet the court may grant leave, if he seeks to amend.⁴ If errors could have been remedied, provided a motion to suppress the deposition

or an objection to its admission had been made, the same will be considered as waived when not so made.⁵ A witness may be allowed to correct his testimony in a deposition by oral testimony given at the trial.⁶

1, *Eller v. Richardson*, 89 Tenn. 575; *Gartside Coal Co. v. Maxwell*, 20 Fed. Rep. 187, where a deposition was withdrawn to allow officer to amend the certificate; *Donahue v. Roberts*, 19 Fed. Rep. 863; *Conger v. Cotton*, 37 Ark. 286; *Bewley v. Ottinger*, 1 Heisk. (Tenn.) 354. See sec. 702 *supra*.

2, *Porter v. Beltzhoover*, 2 Har. (Del.) 484.

3, *Jenkins v. Anderson*, (Pa.) 11 At. Rep. 558; *Semmens v. Walters*, 55 Wis. 675.

4, *Oatman v. Andrews*, 43 Vt. 466; *Wolfe v. Underwood*, 97 Ala. 375.

5, *Tuthill Springs Co. v. Smith*, 90 Iowa 331; *American Pub. Co. v. Mayne Co.*, 9 Utah 318.

6, *Baltzer v. Chicago, M. & N. Ry. Co.*, 89 Wis. 257.

§ 713. **The certificate.** — It is the usual practice to require the commissioner or the other officer to attach a certificate to be returned with the deposition, to the end that the court may know how the officer has performed his duty, and whether the statute and rules of court have been complied with. Although the practice varies in different states as to the form of the certificate, it is generally necessary for it to show affirmatively that the deposition was taken by and before the commissioner or magistrate making the return.⁷ It should set forth that the respect-

ive parties had appeared, or the contrary,¹ as well as the time and place at which the testimony was taken.² It should appear that the witnesses were duly sworn or affirmed;³ that the testimony was reduced to writing by the officer, or by some disinterested person in his presence,⁴ and that the witness had subscribed the deposition.⁵ But where the statute does not require the signature of the witness, the deposition is not necessarily to be rejected on account of the omission of the signature.⁷ Other requisites which have been prescribed are, that the certificate should show the state and county in which the deposition was taken,⁸ and contain the names of the witnesses.⁹ Statutes sometimes require the certificate to set forth the reason for taking the deposition and the form of the oath, and whenever these or other requirements are prescribed in the statute, there must be compliance.¹⁰ But it has frequently been held that, if some of the matters usually stated in the certificate are contained in the *caption*, so that, when the two are taken together, the court can see that the statute has been complied with, it is sufficient.¹¹

1, Powers v. Shepard, 21 N. H. 60; 53 Am. Dec. 168; Dane v. Mace, 37 N. H. 533; Porter v. Beltzhoover, 2 Har. (Del.) 484; Homberger v. Alexander, 11 Utah 363. As to this subject in federal courts, see secs. 661 *et seq. infra*.

2, Hay v. State, 58 Ind. 337; Carpenter v. State, 58 Ark. 233.

3, Moss v. Booth, 34 Mo. 316; Stetson v. Lyon, 34 Ala. 140.

4, Moss v. Booth, 34 Mo. 316; Stetson v. Lyons, 34 Ala. 140; Thomas v. Wheeler, 47 Mo. 363; Bailis v. Cochran, 2 Johns. 417.

5, Bailis v. Cochran, 2 Johns. 417.

6, Bush v. Barron, 78 Tex. 5; Bell v. Chambers, 38 Ala. 660; Thompson v. Haile, 12 Tex. 139.

7, Mobley v. Hamit, 1 A. K. Marsh. (Ky.) 590; Moulson v. Hargrove, 1 Serg. & R. (Pa.) 201; Ede v. Johnson, 15 Cal. 53, where the instrument was an affidavit.

8, Payne v. Briggs, 8 Neb. 75.

9, Amick v. Holman, 71 Mo. 445.

10, Patterson v. Wabash Ry. Co., 54 Mich. 91; Western Union Tel. Co. v. Collins, 45 Kan. 88, where the form of an oath was defective; Emberson v. McKenna, 4 Tex. App. 137, where there was a failure to show that deposition was signed and sworn to.

11, Borders v. Barber, 81 Mo. 636; Houston Ry. Co. v. Larkin, 64 Tex. 454; Wanzer v. Hardy, 4 Wis. 229.

§ 714. **The caption.**—The caption is the heading of the deposition in which the officer generally states the time and place of taking the deposition, and the authority by which it is taken, as well as the names of the parties and the witnesses sworn.¹ Although the statutes and rules of court frequently prescribe the requisites of the certificate to be attached to the deposition, this is not usual in respect to the caption, hence *irregularities* in respect to this part of the deposition are *less likely to be fatal*. If the certificate states the facts showing that the statute has been

substantially complied with, and contains those recitals usually contained in the caption, the deposition should be admitted, however defective the caption may be.³ If, however, the statute, under which the deposition is taken, prescribes what the caption shall contain, it must be substantially complied with.⁴ *Mere mistakes* in the caption as to the names of the parties or witnesses, or in other respects, which work no prejudice to the rights of the party objecting, are generally disregarded.⁴

1, Proff. Not. sec. 58; Weeks Dep. sec. 523.

2, Plummer v. Roads, 4 Iowa 587; Boykin v. Smith, 65 Ala. 294; Freeland v. Prince, 41 Me. 105; Rand v. Dodge, 17 N. H. 343.

3, Welles v. Fish, 3 Pick 74.

4, Hayword Rubber Co. v. Dunklee, 30 Vt. 29; Field v. Tenny, 47 N. H. 513; Spaulding v. Robbins, 42 Vt. 90; Kidder v. Blaisdell, 45 Me. 461.

§ 715. **Adjournments.**— Commissioners or other officers authorized to take depositions must observe the directions of the commission and the statute or rules of court. Hence, they have not the *authority to postpone or continue* the taking of the deposition to another time or place, in a manner not warranted by the notice or commission.¹ Thus, where the person on whom the notice had been served was present with his attorney at the time and place, and waited until notified by

the officer that the time had expired, and then discharged his attorney, it was held that the deposition was inadmissible, although the officer had adjourned the proceeding to a later hour in pursuance to a telegram from the other party of which notice was given.² The notice often contains *a clause* to the effect *that the taking of the deposition is to be continued* from day to day until completed. It is clear that, in such case, the notice is sufficient to warrant the continuance from day to day until the witnesses have finished their testimony.³ But such a notice or commission does not usually authorize a continuance for a longer period than the succeeding day.⁴ Where, however, the succeeding day falls on a legal holiday or on Sunday, an adjournment to the first business day is no ground for suppressing the deposition.⁵ In some cases, the courts have sanctioned the *practice* by the officer of *postponing the taking* of the deposition beyond a succeeding day, where it did not appear that such continuance had resulted injuriously to the other party, and no motion had been made to suppress the deposition.⁶ Although the notice or commission only mentions a certain date, if it is inconvenient to finish the testimony on that date, it is proper to continue to the succeeding day.⁷ If a deposition is taken on a *day other than that stated in the notice* or citation, and no legal continuance appears to have been

made, it should not be received.⁸ Where a party had been duly notified of the time and place, but did not attend, it was held admissible to adjourn the taking of the deposition to the house of the witness on account of his sickness, without further notice.⁹

1, *Beach v. Workman*, 20 N. H. 379; *Johnson v. Perry*, 54 Vt. 459; *Bowman v. Branson*, 111 Mo. 343; *Buddicum v. Kirk*, 3 Cranch 293.

2, *Hennessy v. Stewart*, 31 Vt. 486.

3, *Stainbrook v. Drawyer*, 25 Kan. 383; *Finlay v. Humble*, 2 A. K. Marsh. (Ky.) 569; *Weeks Dep.* 288.

4, *Raymond v. Williams*, 21 Ind. 241; *Harding v. Merrick*, 3 Ala. 60; *Parker v. Hayes*, 23 N. J. Eq. 186. An adjournment from Saturday till Monday following has been held admissible, *Stainbrook v. Drawyer*, 25 Kan. 383.

5, *Leach v. Leach*, 46 Kan. 724, where an adjournment was taken over Sunday and Washington's birthday.

6, *Wixom v. Stephens*, 17 Mich. 518; 97 Am. Dec. 205, where the witness did not appear, the commissioner waited two hours and then adjourned the examination to another day and place in the same county.

7, *Babb v. Aldrich*, 45 Kan. 218; *Read v. Patterson*, 11 Lea (Tenn.) 430; *Ulmer v. Austill*, 9 Port. (Ala.) 157. See also, *Brandon v. Mullenix*, 11 Heisk. (Tenn.) 446. Whenever a continuance is made, it should appear in the proceedings that it was for sufficient cause, *Kisskadden v. Grant*, 4 Mo. 74. A deposition was properly suppressed because it did not appear from the record to have been continued for cause, *Bowman v. Branson*, 111 Mo. 343.

8, *Bennett v. Bennett*, 37 W. Va. 396.

9, *Lowd v. Bowers*, 64 N. H. 1.

§ 716. Presence of party when deposition is taken on commission.—Where depositions are taken on commission, upon

interrogatories settled in advance, there is no necessity for the presence of the parties or attorneys. Indeed, their presence is an impropriety which, by the rules of some courts, is forbidden. This is upon the theory that the witness who is to be examined upon a commission ought to answer the interrogatories and cross-interrogatories in the absence of those whose interest may be promoted by distorting his testimony.¹ According to this view, the deposition will be excluded, if a party who has taken out a commission to examine a witness on interrogatories is present at its execution, unless something in the nature of a waiver is shown;² and on the same view, it has been held immaterial that the commissioner did not take the testimony at the place named in the notice and commission, when the other party did not appear.³

1, Sayles v. Stewart, 5 Wis. 8.

2, Holmes v. Dobbins, 19 Ga. 630; Beverly v. Burke, 14 Ga. 70. In Iowa, the statute provides that, in such cases, neither party shall be present, unless both are; and the certificate is required to state whether either party is present, Iowa Code 3738; Turner v. Hardin, 80 Iowa 691. See also, Nutter v. Ricketts, 6 Iowa 92. The contrary view has been held in some cases, when it did not appear that the witness had been influenced by such presence, Otis v. Clark, 2 Miles (Pa.) 272; Nutter v. Ricketts, 6 Iowa 92.

3, Sayles v. Stewart, 5 Wis. 8, where the testimony was taken at 52 Wall St., New York, while the place named in the commission was the corner of Nassau and Cedar streets.

§ 717. **Retaking depositions.** — It was a familiar rule in the old chancery practice that, after the publication of the testimony, no new testimony should be taken, and no witness should be re-examined, except upon a clear showing that the interests of justice demanded it. The rule rested upon the view that it was a dangerous proceeding to permit parties to make out evidence by piecemeal, and to make up the deficiencies of original depositions by other evidence.¹ Although in modern practice the courts have by no means lost sight of the reason for the old rule, much greater latitude is allowed than formerly; and there is no doubt of the power of the court to allow the deposition of a witness to be retaken when *newly discovered evidence* seems to have been omitted, or where there has been such *mistake* that the interests of justice require a second examination. Thus, if interrogatories have not been fully answered, and the deposition is objected to for that reason,² or if the deposition has been suppressed³ or lost,⁴ the court may order it to be taken again. While it is the general practice to obtain the *leave of court*, and while such leave has frequently been held necessary,⁵ yet there is authority for the view that the deposition may be retaken, in such case, without leave.⁶ So where a deposition has been *defectively taken*, or exceptions have been taken to it, and it is liable to be suppressed, it is proper to have

it retaken without waiting to see whether the objections will be waived.⁷ On the principle under discussion, if justice seems to require it, the court may order a deposition *returned for further cross-examination* of the witness.⁸

1, Whitelocke v. Baker, 13 Ves. 511. The Schooner Ruby, 5 Mason (U. S.) 451.

2, Davis v. Moody, 13 Ga. 188.

3, Arundel v. Pitt, Ambler 585; Sanford v. Paul, 3 Brown Ch. 370; Weeks Dep. sec. 528, and cases there cited.

4, Weeks Dep. sec. 526.

5, Kirby v. Cannon, 9 Ind. 371; Addleman v. Swartz, 22 Ind. 249; Thurber v. Cecil Nat. Bank, 52 Fed. Rep. 513; Newman v. Kendall, 2 A. K. Marsh. (Ky.) 234; Evansich v. Gulf Ry. Co. 61 Tex. 24; Raney v. Weed, 1 Barb. 220, where the court refused application after the death of the only other witness cognizant of the facts.

6, Parker v. Chambers, 24 Ga. 518; Davis v. Moody, 13 Ga. 188; Beach v. Schmuitz, 20 Ill. 185, where it was held that the court may determine which deposition shall be read.

7, Boone v. Miller, 73 Tex. 557; Fox v. Jones, 1 W. Va. 205; 91 Am. Dec. 383; Akers v. Demond, 103 Mass. 318.

8, Graham v. Carleton, 9 N. Y. S. 392, where a re-cross-examination was ordered at the expense of the opposite party for the reason that he had improperly supplied the witness with a copy of the questions.

§ 718. Exhibits to depositions.— Under the familiar rule that parol evidence should not be received of the contents of written instruments, exhibits and papers, referred to in a deposition, can not be read, unless they are *attached to the deposition, and offered* and made a part of it.¹ Thus, where a witness

stated that he was made an agent by an instrument in writing, and proceeded to state the powers conferred upon him thereby, and did not produce or account for the instrument, it was held that the testimony was properly rejected as parol evidence of the contents of a written instrument.² Nor does a paper become evidence by the mere fact that it is produced before the commissioner and marked for identification, or by the mere fact that proof of its execution has been given.³ Where there are several sets of interrogatories to be propounded to different witnesses, and where the same exhibit cannot be attached to each, it may be annexed to one set of interrogatories and referred to and properly described in the other.⁴ *Witnesses residing out of the state are not compelled to annex* original letters or other *documentary* evidence to depositions; they are not called upon to risk the loss of valuable original papers by annexing them to a deposition to be transmitted to a distant state. If they are unwilling to do so, *copies can be attached*, and a foundation is thus laid for the admission of such copies in evidence.⁵ The copy should be properly sworn to, identified and annexed to the deposition.⁶ It is proper for the commissioner to return a copy of a deed referred to in the testimony, whether the deed is admissible in evidence at the trial or not.⁷ In a Massachusetts case, where a witness in another state had refused

to annex original letters on the ground that they related to other private matters in no way relevant to the action, the court held that the most which could be required of the witness in such a case was to furnish *true extracts* from such letters as he had relating to the subject of inquiry, and to make oath as to their verity, upon being paid a reasonable charge therefor.⁸ If the circumstances are such that the party cross-examining a witness at the taking of a deposition is entitled to the entire letters or documents, and only extracts are attached, his remedy is not an objection at the trial, but a motion before the trial to have the deposition amended or suppressed.⁹ It is obvious that, if a document is *irrelevant* or incompetent as *evidence*, it is *not made competent by being attached* to a deposition, if proper objection is made.¹⁰

1, *Crary v. Carrodine*, 4 Ark. 216; *Mather v. Goddard*, 7 Conn. 303; *Petriken v. Collier*, 7 Watts & S. (Pa.) 392. A paper pinned to a deposition and not referred to therein or otherwise identified, is not evidence, *Susquehanna & W. N. Ry. Co. v. Quick*, 61 Pa. St. 328; so loose papers returned in the same envelope as the deposition are not part of the same, *Apfel v. Crane*, 83 Ala. 312. See also, *Toby v. Oregon Pac. Ry. Co.*, 98 Cal. 490.

2, *Hotchkiss v. Dailey*, 2 Ind. 117; *King v. Dale*, 2 Ill. 513.

3, *Edmonstone v. Hartshorn*, 19 N. Y. 9.

4, *Mobley v. Leophart*, 51 Ala. 587.

5, *Amherst Bank v. Conkey*, 4 Met. 459; *Petersburg Co. v. Manhattan Ins. Co.*, 66 Ga. 446; *Commercial Bank v. Union Bank*, 11 N. Y. 203; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137.

- 6, *Gimbel v. Hufford*, 46 Ind. 125; *Thom v. Wilson*, 27 Ind. 370; *Fisher v. Greene*, 95 Ill. 94.
- 7, *Giles v. Paxson*, 36 Fed. Rep. 882.
- 8, *Amherst Bank v. Conkey*, 4 Met. 459.
- 9, *Wright v. Cabot*, 89 N. Y. 570.
- 10, *Ashley v. Wolcott*, 3 Gray 571; *Smith v. Ellison*, (Col. App.) 40 Pac. Rep. 502.

§ 719. **Depositions taken in foreign countries.**—The usual method of taking depositions in foreign countries is by commission, and not upon oral interrogatories *de bene esse*. It was early decided by the supreme court of the United States that this was the only regular mode of taking such depositions.¹ Another mode of taking depositions abroad is, however, now recognized by the statutes of the United States and of some of the states, namely, by means of *letters rogatory*.² By this term is meant an instrument sent in the name and by the authority of a judge or court to another such officer, requesting the latter to cause a witness, who is within the jurisdiction of the judge or court to whom such letters are addressed, to be examined upon interrogatories filed in a cause pending before the former.³ "By this instrument, the court abroad is informed of the pendency of the cause and the names of the foreign witnesses, and is requested to cause their depositions to be taken in due course of law, for the furtherance of justice, with an

offer, on the part of the tribunal making the request, to do the like for the other in a similar case. The writ or commission is usually accompanied by interrogatories, filed by the parties on each side, to which the answers of the witnesses are desired. The commission is executed by the judge who receives it, either by calling the witness before himself, or by the intervention of a commissioner for that purpose; and the original answers, duly signed and sworn to by the deponent and properly authenticated, are returned with the commission to the court from which it issued."⁴ This practice is seldom resorted to, but prevails in those cases where the authorities of the foreign country do not allow commissioners appointed by our courts to administer oaths or take testimony. Where letters rogatory are issued, the deposition is taken, not according to the rules prescribed by the court where the action is pending, but according to the procedure adopted by the court of the country whose assistance is asked.⁵ Proceedings to take such depositions or any depositions upon commission abroad should be liberally construed.⁶

1. *Stein v. Bowman*, 13 Peters 209; *Cootes v. Tannhouser*, 18 Fed. Rep. 667, where it was held that such depositions cannot be taken under sec. 863 Rev. Stat. U. S. The appointment of commissioners in such a case is in the discretion of the court, *United States v. Parrot*, McAll 447.

2. Rev. Stat. U. S. sec. 875.

3. *Bouv. L. Dict.* title Letters Rogatory.

4, 1 Greenl. sec. 320.

5, Nelson v. United States, Peters C. C. 235; Weeks Dep. sec. 128.

6, Dusert v. Roe, 1 Wall. Jr. (U. S.) 39; Gilpin v. Consequa, 3 Wash. (U. S.) 184; Winthrop v. Union Ins. Co., 2 Wash. (U. S.) 7.

§ 720. Depositions to perpetuate testimony.—In a former section attention was called to the practice of courts of equity with respect to a class of depositions taken to perpetuate testimony, otherwise called depositions *in perpetuam rei memoriam*. They are resorted to much less frequently than others, and will require no elaborate discussion. By the *federal statute*, depositions of this character may be taken upon application to the circuit court, as a court of equity, according to the usages of chancery, if the subject is cognizable in any court of the United States.¹ "Any court of the United States may admit in evidence in any cause before it any deposition taken *in perpetuam rei memoriam*, which would be so admissible in the court of the state wherein such cause is pending, according to the laws thereof."² This mode of taking testimony is generally regulated by *statutes in the several states*. Provisions quite common to such statutes are that the moving party shall present to the court his application to the effect that he expects to be a party to an action, or that a controversy is likely to arise as to some sub-

ject, together with the names of all persons interested therein and the names of the witnesses whose testimony it is necessary to preserve, as well as such other facts as may tend to show that the testimony is material and necessary to be preserved.* If the court is satisfied that sufficient cause is shown, an order issues requiring notice for the taking of the deposition of such witnesses to be served upon all persons interested in the subject matter; this testimony is then duly certified and filed with some public officer named in the statute, and, if a suit subsequently arises, may be read in evidence by the parties interested or by their privies. It will be observed that, although the procedure is somewhat different, the essential distinction between this and other depositions is that testimony of this character is taken, not for use in a pending suit, but to be preserved for use in *an anticipated suit*. In some states, however, if an action be pending at the time of taking the deposition between the person making the petition and those named therein or those in privity with them, and if the proceedings are regular, the deposition so taken may be used.

1, Rev. Stat. U. S. sec. 866.

2, Gould v. Gould, 3 Story (U. S.) 516.

3, See the statutes of the several states. See also, articles 13 L. Rep. 256; 25 Cent. L. Jour. 242; 27 Cent. L. Jour. 495.

CHAPTER 19.

DISCOVERY.

- § 721. Bill of discovery — General nature of.
- § 722. Statutory discovery.
- § 723. Effect of statutes upon former remedy.
- § 724. Scope of the examination.
- § 725. Same — Examination under the control of the court.
- § 726. Privilege—Self-crimination.
- § 727. Inspection of books and papers.
- § 728. Inspection of documents in the United States courts.
- § 729. Statutory discovery of books and papers in state courts.

§ 721. **Bill of discovery — General nature of.** — It was one of the infirmities of the procedure in the common law courts that they afforded no adequate remedy for one party to obtain from his adversary any disclosure of facts material to the issue, either by compelling him to make admissions in his pleading, or to testify at the trial or before, or to furnish documents material to the issue for inspection. It was to remedy these defects that the courts of chancery entertained the *bill of discovery*, that is, a bill which asks no relief other than the discovery of facts rest-

ing in the knowledge of the defendant, or the discovery of deeds, writings or other things in his possession or power, in order to maintain a right or title of the party asking it in some suit or proceeding in another court.¹ From the nature of this proceeding, as soon as the defendant had interposed his answer making disclosure of facts in compliance with the rules of equity, the action terminated; the party seeking the discovery had accomplished all the relief which this auxiliary proceeding could afford, and he was at liberty to use the evidence thus obtained in his other action.² The courts of equity, not only exercised this auxiliary jurisdiction, but they always asserted their right to probe the conscience of the defendant; and it was an incident of their general jurisdiction that the *defendant could be compelled to answer on oath* the allegations and interrogatories in the bill. "It is the right, as a general rule, of the plaintiff in equity to examine the defendant upon oath as to all matters of fact which, being well pleaded in the bill, are material to the proof of the plaintiff's case, and which the defendant does not, by his form of pleading, admit. Courts of equity as a general rule oblige a defendant to pledge his oath to the truth of his defense; with this qualification, the right of a plaintiff in equity to the benefit of the defendant's oath is limited to a discovery of such material facts as relate to the plaintiff's

case, and it does not extend to the discovery of the manner in which or of the evidence by means of which the defendant's case is to be established, or to any discovery of the defendant's evidence."³ The bill of discovery could be maintained *by the plaintiff* in an action at law against the defendant therein, *or by the defendant* in an action at law against the plaintiff therein, and also by the defendant in a suit in equity in the form of a cross-bill against the complainant therein, in order to obtain a disclosure of facts necessary to enable him to frame his answer to the original bill; or it could be maintained to secure a disclosure of facts, material as evidence on his behalf, at the hearing upon the original bill and answer thereto.⁴ There are important *limitations* upon the right to bring a bill for discovery, among which the following may be mentioned: It will not be entertained when the discovery is not material to the suit; when the plaintiff has no interest in the subject matter; when an action will not lie; where the subject is not cognizable in any court, or where the defendant is not bound to disclose his own title or to criminate himself.⁵ Closely connected with the right to discovery in chancery is the right to compel the defendant to *produce*, for the inspection of complainant, *documentary evidence* which is in his possession, and is necessary to be used as evidence for the complainant. It was a familiar rule that, when

a defendant had admitted in his answer, in reply to allegations or interrogatories of the bill, that he had possession of such documents, and that they were material to the plaintiff's case or to the relief demanded by him, they had to be produced for inspection on the order of the court. One of the limitations upon the right to discovery is thus stated by Mr. Pomeroy: "The ground upon which the plaintiff's right to the production of documents, as well as to any other discovery, must rest is that they relate to and are *material* to his own case, or to the relief which is demanded in his suit; he has no right to a discovery of the defendant's evidence, nor to the production or inspection of papers connected with the defendant's title alone. If, however, the documents are material to his own case, or to the relief he demands, the fact that they may also be evidence for defense, or may tend to support the defendant's title or contention does not prevent the plaintiff from compelling their production." ¹

1, 2 Story Eq. Jur. sec. 1486; 1 Story Eq. Jur. sec. 989; 1 Pom. Eq. Jur. secs. 144, 191. The whole subject of this chapter is discussed in an extended note, 41 Am. St. Rep. 388-396.

2, See the authorities last cited.

3, Wig. Disc. 21, 22, quoted in 1 Pom. Eq. Jur. sec. 194 note.

4, Pom. Eq. Jur. sec. 191.

5, Pom. Eq. Jur. secs. 195 *et seq.*; 2 Story Eq. Jur. sec. 1489.

6, 1 Pom. Eq. Jur. sec. 207.

§722. **Statutory discovery.**— We have only stated in the most general manner a few of the more important and familiar rules governing the right of discovery in the courts of equity. While the details of this subject more properly belong to other works, the brief statement which has been given is necessary to a proper understanding of the mode of discovery now in general use. In the United States, statutes have been quite generally adopted permitting either party to *examine the adverse party as a witness at the trial*; and in many of the states, statutes have also been adopted providing that suitors may have discovery from adverse parties *before the trial* by requiring them to submit to an examination as to facts relevant to the issue. These statutes do not restrict the right of examination to either party. On the contrary, the defendant has the same right as the plaintiff to invoke their aid. They sometimes provide that the examination may be obtained on application to the court by affidavit or petition showing the nature of the action and the necessity for discovery. In other states, the examination may be had without any affidavit or petition by simply giving the notice prescribed by statute. Under these statutes the examination is generally taken after issue has been joined, though there are statutes which provide that it may be had before; but, in such cases, it is usual

for the court to limit, by an order, the subjects to which the examination shall extend. In some states, as well as in England, the statutes and rules of court provide that discovery may be made in the manner already stated, except that the party making the application files with the court written interrogatories to which the adverse party is compelled to make answer in writing.¹ Since the courts had no inherent common law right to compel such examination, the statutes must be strictly followed.² It is generally held, under these statutes, that the party taking the deposition of the adverse party is not compelled to offer it on the trial;³ nor does he, by so doing, make the adverse party his own witness.⁴ Under the statutes, the moving party is not bound by the answers of his adversary, but may rebut such testimony or impeach the witness.⁵ It is clear that the one at whose instance the examination is taken may offer the deposition of his adversary so taken or portions thereof on the trial as admissions, even though such witness is present in court.⁶

1, Tayl. Ev. sec. 522. See the statutes of the jurisdiction.

2, *Heishon v. Knickerbocker Life Ins. Co.*, 77 N. Y. 278; *First National Bank v. Wood*, 26 Wis. 500.

3, *Shober v. Wheeler*, 113 N. C. 370.

4, *Shober v. Wheeler*, 113 N. C. 370.

5, *Crocker v. Agenbroad*, 122 Ind. 585; *Meier v. Paulus*, 70 Wis. 165.

6, *Williams v. Cheney*, 3 Gray 215; *Meier v. Paulus*, 70 Wis. 165.

1723. Effect of statutes upon former remedy.—Some of the statutes under consideration expressly take away the old remedy of discovery. In other instances, the courts have construed the ancient remedy as practically obsolete, and have held that, where the statute gives an adequate remedy in the principal action in form of the right to fully examine the adverse party before the trial, the action for discovery is unnecessary and will not be allowed.¹ Although this view seems to accord with the general principles of equity jurisdiction, it is not universally accepted, and we find high authority for the other view that the jurisdiction of the courts of chancery, which existed prior to these statutes, is not taken away by implication.² The statement has sometimes been made that the statutory proceeding is a substitute for the bill of discovery; and there are decisions which have construed these statutes in this spirit, and have followed the analogies of the equity rules relating to bills of discovery. But it is the present tendency to treat these statutes as something more than an attempt to perpetuate the old bill of discovery under a new name and form. It is a fair construction of these statutes, that it was the legislative intent not only to compel disclosure in the principal suit, and to avoid the cumbersome practice of the ancient bill of discovery, but to give a broader range to the examination.³

1, *Chapman v. Lee*, 45 Ohio St. 356. As to the effect of the statutes, see note, 41 Am. St. Rep. 389.

2, *Post v. Toledo, C. & St. L. Ry. Co.*, 144 Mass. 341; 59 Am. Rep. 86; *Kendallville Refrigerator Co. v. Davis*, 40 Ill. App. 616; *Handley v. Heflin*, 84 Ala. 600; *Kearney v. Jeffries*, 48 Miss. 343.

3, See cases cited under the next section.

§ 724. Scope of the examination.—As an illustration of the tendency mentioned in the last section, it has often been held that the examination is not to be confined, as in the equity practice, to those facts which were set up in the pleadings of the moving party, but on the contrary, it *may extend to matters in support of the case or defense of the other party*.¹ Under this class of statutes, it has been held within the scope of the examination to elicit a full and complete disclosure of whatever may be relevant to the controversy, which is to be ascertained by the issues made in the pleadings, or, if issue has not been joined, by an order limiting the subjects to which the examination may extend.² Other statutes, however, are so framed that the interrogatories can only relate to matters necessary to support the case or defense of the applicant, in analogy to the bill of discovery.³ Mr. Taylor gives many illustrations of the decisions under the modern English practice holding that under the statute and rules of court, as a general rule, a party can not inquire into facts which relate exclusively to

the case of his adversary, although he may ask questions, the answers to which will advance his own case, even though they may also disclose his opponent's case.⁴ It is clearly within the general scope of these statutes to allow the examining party to ascertain such facts, unknown to him and within the knowledge of the other party, as will enable him to make proper *preparation for the trial*.⁵ In some of the states, the statute provides, as the *penalty for refusal to answer*, that the pleadings or interrogatories of the examining party shall be taken as confessed, that is, that the facts as alleged by him shall be accepted as true as set forth.⁶

1, *Herbage v. City of Utica*, 109 N. Y. 81; *Kelly v. Chicago & N. W. Ry. Co.*, 60 Wis. 480; *Whereatt v. Ellis*, 65 Wis. 639; *Haynes v. Hatch*, 15 N. Y. S. 615.

2, *Kelly v. Chicago & N. W. Ry. Co.*, 60 Wis. 480; *State v. Baetz*, 86 Wis. 29. The scope of the examination may be as broad as on cross-examination, *Nichols v. McGeoch*, 78 Wis. 360.

3, *Baker v. Carpenter*, 127 Mass. 226; *Sheren v. Lowell*, 104 Mass. 24; *Jacksonville, T. & K. W. Ry. Co. v. Peninsular Land Co.*, 27 Fla. 157; *Downie v. Nettleton*, 61 Conn. 593.

4, *Tayl. Ev. secs. 532 et seq.*

5, *Thayer v. Humphreys*, 69 Hun 343; *Chapin v. Thompson*, 21 N. Y. S. 1091; *Wahle v. McMillan*, 20 N. Y. S. 372; *in re Nolan*, 24 N. Y. S. 238; *Arnold v. Pawtuxet Water Co.*, 18 R. I. 189; *Evans v. Lancaster City St. Ry. Co.*, 64 Fed. Rep. 626.

6, *Gulf, C. & S. F. Ry. Co. v. Nelson*, 5 Tex. Civ. App. 387. The rule has been applied on application of a corporation, although the statute made no provision for examining corporations, *First Nat. Bank v. Smith*, 36 Neb. 199.

§ 725. **Same—Examination under control of the court.**—The courts are everywhere agreed in the view that these statutes allowing discovery should be so construed as to prevent their abuse; the privilege of examining the adversary in advance of trial should not be allowed to become a means of oppression. As under the ancient practice in discovery, a mere "fishing bill" was not tolerated, so questions, which are prompted by mere curiosity or impertinence, which have no bearing upon the case, or which recklessly and unnecessarily tend to annoy or expose private affairs, should not be allowed.¹ Accordingly, under these statutes, the courts exercise the power of so regulating the procedure, either by *limiting the subjects to which the examination may extend*, or by other similar orders, that the disclosure may be kept within proper limits.² Under those statutes which provide for the examination of the adverse party before trial, and specify what the affidavit, preliminary to the order, shall contain, it has been held discretionary with the judge to whom the application is made to grant or deny the order, although the statute provided that the judge must grant the order upon a proper affidavit.³ The object of requiring such an affidavit is to enable the judge to determine whether the examination should be ordered, and also to place limits upon it. In such cases, where the judge can

see that the examination is sought merely for annoyance or for delay, and that it is not in fact necessary and material, he is not required to make the order.⁴ Under the statutes *only parties to the record* can be called upon to make the disclosure; the fact that one is interested in the result is not sufficient.⁵ But *sureties* may also be compelled to submit to such an examination when their principals are sued;⁶ and where the action is brought for the benefit of a third person, the *nominal party* may be examined.⁷ But the *officers of a corporation* cannot be compelled to submit to an examination under the general statute, unless there is a special statute upon the subject.⁸ Statutes now exist, however, in some states allowing the examination of the officers of corporations, subject to the same general rules as in other cases.

1, Jenkins v. Putnam, 106 N. Y. 272; Glen Cove Manfg. Co. v. Sutro, 6 N. Y. S. 384; Rigdon v. Conley, 31 Ill. App. 630, in this case the order related to the production of books and papers. But the party need have no property interest in the instrument, Arnold v. Pawtuxet Water Co., 18 R. I. 189. See sec. 729 *infra*. A party can not be compelled to give the names of his witnesses, Wabash Ry. Co. v. Morgan, 132 Ind. 430.

2, Stevens v. Flannagan, 131 Ind. 122; Meek v. Witherington, 67 Law T. 122.

3, Kelly v. New York Cent. & H. Ry. Co., 66 Hun 629.

4, Jenkins v. Putnam, 106 N. Y. 272; Sheehan v. Albany Turnpike Co., 8 N. Y. S. 14; Bloom v. Patton, 10 N. Y. S. 228.

5, Seeley v. Clark, 78 N. Y. 221.

6, *State v. Baetz*, 86 Wis. 29.

7, *Harding v. Merrill*, 136 Mass. 291. So the real party may be examined, though he is not a party of record, *Willis v. Boddeley*, 2 Q. B. 324.

8, *Boorman v. Atlantic Ry. Co.*, 78 N. Y. 599; *People v. Mutual Gas Co.*, 74 N. Y. 434. But see, *Holt v. Southern F. & W. Co.*, 116 N. C. 480. The fact that the officers of a corporation are competent witnesses is not, however, a reason for refusing to sustain a bill of discovery against the corporation, *Continental Bank v. Heilman*, 66 Fed. Rep. 184.

§ 726. Privilege — Self-crimination. —

In analogy to the familiar rule as to discovery, these statutes do not compel a party to submit to an examination as to facts which would expose him to punishment for crime, or to a penalty.¹ But an application for an examination cannot be resisted on the ground that the testimony may subject the party to a criminal prosecution, where there are facts relevant to the case which he can disclose with impunity. The proper practice is to raise the question of privilege as to the objectionable testimony at the time of the examination.² Moreover a *defendant* is always *compelled to disclose his fraud* and fraudulent practices, *when such evidence is material* to the plaintiff's case, even though the fraud might be so great as to expose the defendant to a prosecution for conspiracy unless perhaps the indictment is actually pending.³ It is a familiar rule in the law of discovery in equity that a party is not only privileged

from stating the main facts which might criminate him, but the privilege extends also to *every incidental fact* which might form a link in the chain of evidence establishing such liability.⁴ Doubtless the same principle should be recognized in statutory discovery. It is equally clear that, under this method of discovery, there is no reason for departing from those rules of public policy which forbid an *attorney, husband or wife* to reveal those communications which, in the law, are recognized as privileged.⁵ The right of a party to an examination of the adversary before trial is *an important right*, so important that an error of the court in refusing to allow a disclosure of facts necessary to prepare for trial is not cured by the introduction of, or opportunity to introduce, testimony on the same point at the trial.⁶

1, *Franks v. Reimer*, 9 N. Y. S. 273; *Brannon v. Press Pub. Co.*, 8 N. Y. S. 870; *Roberts v. Western Ins. Co.*, 40 Ill. App. 428. See secs. 729, 887 *et seq. infra*.

2, *Haynes v. Hatch*, 15 N. Y. S. 615; *Carter v. Good*, 57 Hun (N. Y.) 116.

3, *Mitchell v. Koecker*, 11 Beav. 380; *Robinson v. Kitchin*, 35 Eng. L. & Eq. 558; *Skinner v. Judson*, 8 Conn. 528; *O'Connor v. Tack*, 2 Brewst. (Pa) 407. See also, *Currier v. Concord Ry. Co.*, 48 N. H. 321; 1 Pom. Eq. Jur. sec. 202.

4, 1 Pom. Eq. Jur. sec. 268. See secs. 888 *et seq. infra*.

5, See secs. 751 *et seq.*, 766 *et seq. infra*.

6, *Baker v. Carpenter*, 127 Mass. 226.

§ 727. Inspection of books and papers.

It is within the general powers of *courts of chancery* to order the discovery and inspection of documents before trial by virtue of their inherent jurisdiction over discovery. It has been the practice of such courts to frame their own rules, and to adjust the procedure to meet the requirements of justice.¹ It seems to have been the practice of the *courts of common law*, to a limited extent, to make orders for the inspection of writings in the possession of one party to a suit in favor of the other.² But in some of the cases, it was held that an order for inspection would be denied, except in those cases where the paper itself constituted a cause of action, or might be considered as held in trust for the moving party.³ This limited jurisdiction of the common law courts was in the nature of a usurpation, and was exercised sparingly and with hesitation, until statutes were enacted in England and in this country conferring upon common law courts the power to compel the discovery and inspection of documents.⁴

1, *King v. Leighton*, 58 N. Y. 383; *Holt v. Southern F. & W. Co.*, 116 N. C. 480. See note, 41 Am. St. Rep. 388-396. See sec. 721 *supra*.

2, See cases cited below.

3, *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250; *Bank of Utica v. Hillard*, 6 Cow. 62; *Wallis v. Murray*, 4 Cow. 399.

4, *McQuigan v. Delaware, L. & W. Ry. Co.*, 129 N. Y. 50; 26 Am. St. Rep. 507.

§ 728. **Inspection of documents in the United States courts.**—By the judiciary act of 1789 the following procedure for obtaining the inspection of documents was adopted: "In the trials of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."¹ This power to order the production of books and papers is held to include the power to grant an *inspection before trial*, with permission to make copies.² In the federal courts, the provisions of *state statutes* for inspection of documents *do not control*, but the practice is governed by this section.³ The application must be on motion, with a *reasonable notice* to the party or his attorney.⁴ The statute does not apply in those cases where a *subpoena duces tecum* would issue to compel a witness to produce documents;⁵ and it does not take away the right to relief by bill of discovery.⁶ So it has been held that the

statute *does not apply to suits in equity*, but is confined to actions at law and to cases and under circumstances where the party might be compelled to produce documents by the ordinary rules of procedure in chancery.⁷ But the statute does not require the modes of *procedure* incident to a bill of discovery.⁸ The order will be granted on notice, containing a description of the documents with reasonable certainty.⁹ It should also appear that the documents are in the possession of the other party, and that they are relevant.⁹ It will be observed that, if a plaintiff fails to comply with the order, the court may grant a judgment equivalent to a nonsuit, and, if the defendant fails to comply with the order, the court may give judgment against him by default.¹⁰ It is hardly necessary to add that inspection cannot be compelled where it would *subject the party to a penalty or forfeiture*.¹¹

1, Rev. Stat. U. S. 724. See notes, 41 Am. St. Rep. 388-396; 24 L. R. A. 189.

2, Exchange Nat. Bank v. Washita Cattle Co., 61 Fed. Rep. 190; Bank v. Taylor, 2 Cranch C. C. 427; Lucker v. Pheonix Assurance Co., 67 Fed. Rep. 18.

3, Gregory v. Chicago, M. & St. P. Ry. Co., 10 Fed. Rep. 529; Beardsley v. Littell, 14 Blatchf. (U. S.) 102.

4, Sampson v. Johnson, 2 Cranch C. C. 107; Maye v. Carberry, 2 Cranch C. C. 336; Bank of United States v. Kurtz, 2 Cranch C. C. 342; Thompson v. Selden, 20 How. 194.

5, United States v. Babcock, 3 Dill. (U. S.) 566; Merchants Bank v. State Bank, 3 Cliff. (U. S.) 20. But when *subpoena duces tecum* does not afford adequate relief, the statute applies, Kirkpatrick v. Pope Manfg. Co., 61 Fed.

Rep. 46. A different rule seems to prevail in state courts, see note 16 of the next section.

6, *United States v. Hutton*, 10 Ben. (U. S.) 269. Nor is the pendency of a bill of discovery a bar, *Iasigia v. Brown*, 1 Curt. (U. S.) 401.

7, *Bischoffsheim v. Brown*, 29 Fed. Rep. 341; *Finch v. Rikeman*, 2 Blatch. (U. S.) 301.

8, *Jacques v. Collins*, 2 Blatch. (U. S.) 23; *Vasse v. Mifflin*, 4 Wash. (U. S.) 519; *United States Distillery*, 6 Biss. (U. S.) 483.

9, *Iasigia v. Brown*, 1 Curt. (U. S.) 401; *Triplett v. Bank of Washington*, 3 Cranch C. C. 646; *Jacques v. Collins*, 2 Blatch. (U. S.) 23.

10, *Iasigia v. Brown*, 1 Curt. (U. S.) 264; Rev. Stat. U. S. sec. 724.

11, *Finch v. Rikeman*, 2 Blatch. (U. S.) 301; *Snow v. Mast*. 63 Fed. Rep. 623. See sec. 726 *supra*.

§ 729. **Statutory discovery of books and papers in state courts.**—This statutory discovery has largely superseded the former methods of obtaining the inspection of books and papers. Statutes now quite generally exist in the several states, under which the courts, on application, may, on due notice, in both legal and equitable actions, order either party to give to the other the privilege of inspecting, or the right to take copies of books and papers containing evidence relevant to the merits of the action or the defense.¹ These statutes are intended to give a more convenient remedy than the old bill of discovery; and every party is entitled to this remedy, at least in all cases when

he might have maintained a bill of discovery.³ Such statutes usually provide that *the application* shall be made *upon affidavit or petition* showing that the necessity therefor exists. The statutes and rules of court are usually so framed that the court may exercise a wide discretion in determining whether the order shall be granted, and also as to the mode of granting inspection or allowing copies to be made.⁴ The application should recite facts showing that the examination is necessary. The mere opinion of the party is not enough.⁴ It should also describe the documents to be produced with reasonable certainty, as well as the facts to be proved, so that the court may see that the proposed testimony is relevant.⁵ The application will not be granted to the plaintiff, if it clearly appears that his action can not be maintained.⁶ It has also been held that such an application will not be granted for the purpose of discovering a cause of action;⁷ nor to find out whether there is any defense to the plaintiff's claim, or what such defense may be;⁸ nor will it be granted in favor of the defendant, if his defense is without merit,⁹ or where the object is merely to annoy or to gratify idle curiosity.¹⁰ But if it is reasonably necessary to enable the other party to prepare for trial, the inspection should be allowed.¹¹ The examination should be restricted to such books or documents as relate to the dealings of the

parties or as are, for other reasons, relevant to the issue.¹² So under a statute allowing examination of the officers of a corporation, the examination will be confined to official matters and acts of the company in connection with the books and documents produced.¹³ *The mode of inspection is under the control of the court*; and it is the duty of the court to see that the privilege is not abused.¹⁴ A party is not relieved from producing books or papers, material to the issue, merely because they are private;¹⁵ and it is no answer to the application that the documents or books might be brought into court under a *subpoena duces tecum*.¹⁶ But a party should not be compelled to place such books or papers in the possession or the control of some third party for inspection.¹⁷ It is hardly necessary to add that the *production of documents for inspection before the trial does not make them evidence*. The object of the inspection is generally to enable the party to perfect his pleadings or prepare for the trial; and, if the documents are needed as evidence, their production at the trial may be compelled by *subpoena duces tecum*. The usual rule applies that a party is *not bound to criminate himself*, hence he will not be compelled to produce documents, when he raises this objection under oath;¹⁸ and counsel will not be allowed to comment on such refusal when making the argument to the jury.¹⁹

1, When the power to allow inspection is given generally under the statute, it may be exercised in all cases, even in libel, when the pleadings refer to any document, *Kraus v. Sentinel Co.*, 62 Wis. 660. See note, 41 Am. St. Rep. 388-396; also note, 24 L. R. A. 183-191, discussing the rule established in each state.

2, *Gould v. McCarty*, 11 N. Y. 575; *Arnold v. Pawtuxet Water Co.*, 18 R. I. 189.

3, *Phelps v. Atlantic & Pacific Tel. Co.*, 46 Wis. 366, telegrams; *Clyde v. Rogers*, 94 N. Y. 541, in this case the inspection was under the supervision of a referee. See also, *Ely v. Mowry*, 12 R. I. 570. See elaborate note, 41 Am. St. Rep. 394; also note, 2 L. R. A. 223, and articles, 89 Law Times 175, 191.

4, *Jenkins v. Bennet*, 40 S. C. 393; *Davis v. Dunham*, 13 How. Pr. (N. Y.) 425; *New Eng. Iron Co. v. New York Loan Co.*, 55 How. Pr. (N. Y.) 351.

5, *Ely v. Mowry*, 12 R. I. 570; *Cornish v. Wormser*, 53 Hun (N. Y.) 40.

6, *Bridgman v. Scott*, 13 N. Y. S. 338.

7, *Britton v. McDonald*, 23 N. Y. S. 350; *Nathan v. Whitehill*, 67 Hun (N. Y.) 398.

8, *Govin v. De Miranda*, 17 N. Y. S. 816; *Davis v. Mills*, 163 Mass. 481.

9, *Fromme v. Lisner*, 17 N. Y. S. 850.

10, *Jenkins v. Putnam*, 106 N. Y. 272; *Pyncheon v. Day*, 18 Ill. App. 147. See sec. 725 *supra*.

11, *Arnold v. Pawtuxet Water Co.*, 18 R. I. 189; *People v. Newaygo Circuit Judge*, 41 Mich. 258; *Petrie v. Muskegon Circuit Judge*, 90 Mich. 265.

12, *Allen v. Allen*, 58 Hun (N. Y.) 604; *Dobson v. Graham*, 49 Fed. Rep. 17. The records of an association before and after incorporation were held "a document," within meaning of the statute in *Arnold v. Pawtuxet Water Co.*, 18 R. I. 189.

13, *Blocker v. Guild*, 7 N. Y. S. 651.

14, Veiller v. Appenheimer, 26 N. Y. S. 1051; Hopkinson v. Lord Burghley, L. R. 2 Ch. App. 447.

15, Burnham v. Morrissey, 14 Gray 226; 74 Am. Dec. 676; *In re Dunn*, 9 Mo. App. 255; Taylor v. Milner, 11 Ves. 41; Johnson Ry. Co. v. North Branch Co., 48 Fed. Rep. 191. But a physician can not be compelled to produce books containing information derived from patients, Mott v. Consumers Ice Co., 52 How. Pr. (N. Y.) 148. Nor must an attorney produce his clients' papers, Crosby v. Berger, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; State v. Douglass, 20 W. Va. 770.

16, Phelps v. Atlantic & P. Tel. Co., 46 Wis. 266; Rigdon v. Conley, 31 Ill. App. 630. A different rule prevails in the federal courts, see note 5 of the last section.

17, Lester v. People, 150 Ill. 408; 41 Am. St. Rep. 375 and extended note; Thomas v. Dunn, 6 Man. & G. 274; 46 E. C. L. 278 and note; Ely v. Mowry, 12 R. I. 570, 572; Hilyard v. Township of Harrison, 37 N. J. L. 170, 174. But where there is danger that the document may be lost or destroyed, it may be ordered placed in safe custody, Beckford v. Wildman, 16 Ves. 438.

18, Kraus v. Sentinel Co., 62 Wis. 660; Boyle v. Smithman, 146 Pa. St. 255.

19, Boyle v. Smithman, 146 Pa. St. 255. See sec. 726 *supra*.

CHAPTER 20.

COMPETENCY OF WITNESSES.

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1730. Competency of witnesses — Oath.—"A witness is said to be incompetent to give evidence when the judge is bound, as a matter of law, to reject his testimony, either generally or on some particular subject. In all other cases, it is to be received and its credibility weighed by the jury."¹ By the rules of the common law, there were four classes of witnesses who were deemed incom-

petent to testify: (1) Those insensible to the obligation of an oath; (2) Those wanting in capacity or understanding; (3) Those having a pecuniary interest in the issue; (4) Parties to the issue, although they were sometimes included among those interested in the result.² Other classes of witnesses were also deemed incompetent to testify as to matters which were excluded on grounds of public policy. Of this rule, communications between husband and wife, attorney and client and the like are illustrations.³ It was a well settled rule of the common law that, in the administration of justice, *testimony should be given under the sanction of an oath. In judicio non creditur nisi juratis.* "It is not sufficient that a witness believes himself bound to speak the truth from a regard to character or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. Such motives have, indeed, their influence, but they are not considered as affording a sufficient safeguard for the strict observance of truth. Our law, in common with the law of most civilized countries, requires the additional security afforded by the religious sanction implied in an oath; and, as a necessary consequence, rejects all witnesses who are incapable of giving this security."⁴ Although it was intimated by some of the earlier authorities that the testimony of Jews and heretics would not be received for the reason

that they could not take the Christian oath, yet it was long ago settled that oaths are not peculiar to the Christian religion; that the mode of swearing is not the material part of an oath, and that it ought to be so administered as to suit the conscience of the witness.⁵ While, by the common law, no particular form of religious belief was insisted on as the test of incompetency, it was settled, in the case just referred to, as essential that there should be a belief in an omniscient Supreme Being as the rewarder of truth and avenger of falsehood.⁶ By this rule, the testimony of atheists is excluded.⁷ But if the sense of accountability to Deity exists, it is immaterial whether the witness believes that the punishment will be inflicted in this world or the next.⁸

1, Best Ev. sec. 132. On the general subject of the competency of witnesses, see articles, 8 Am. L. Reg. 1, 65, 193. An interesting discussion of the ancient rules of evidence as to competency will be found in an article in 26 Am. L. Rev. 821; see also a discussion of the early Massachusetts law as to competency by J. B. Thayer, 9 Harv. L. Rev. 1.

2, 1 Phill. Ev. 3; Greenl. Ev. sec. 327.

3, See sec. 751 *et seq. infra*.

4, Greenl. Ev. sec. 368; 1 Phill. Ev. (9th ed.) 10; Cro' Car. 64; R. v. Brasier, 1 Leach Cr. Cas. 200; Maden v' Catanach, 7 Hurl. & N. 360; Wakefield v. Ross, 5 Mason (U. S.) 16; Atwood v. Welton, 7 Conn. 66; Central Ry. Co. v. Rocksfellow, 17 Ill. 541; Smith v. Coffin, 18 Me. 157; Thurston v. Whitney, 2 Cush. 104; Norton v. Ladd, 4 N. H. 444; People v. M'Garren, 17 Wend. 460; Anderson v. Maberry, 2 Heisk. (Tenn.) 653; Scott v. Hooper, 14 Vt. 535; 1 Law Reporter (Boston) 345.

5, *Omychund v. Barker*, 1 Atk. 21; Willes 538; *Curtis v. Strong*, 4 Day (Conn.) 51; 4 Am. Dec. 179.

6, *Omychund v. Barker*, 1 Atk. 21; Willes 538; *The Merimac*, 1 Ben. (U. S.) 490.

7, *Curtiss v. Strong*, 4 Day (Conn.) 51; 4 Am. Dec. 179; *Thurston v. Whitney*, 2 Cush. 104; *Jackson v. Gridley*, 18 Johns. 98; *People v. M'Garren*, 17 Wend. 460.

8, *Hunscom v. Hunscom*, 15 Mass. 184; *State v. Langford*, 45 La. An. 1177; *Brock v. Milligan*, 10 Ohio 121; *Omychund v. Barker*, 1 Atk. 21; Willes 538; *Blocker v. Burness*, 2 Ala. 354; *Butts v. Swartwood*, 2 Cow. 431; *Shaw v. Moore*, 4 Jones (N. C.) 25; *Blair v. Seaver*, 26 Pa. St. 274; *Bennett v. State*, 1 Swan (Tenn.) 411. As to religious belief, see articles, 23 Cent. L. Jour. 505; 19 Am. L. Rev. 343; as applied to an Agnostic, 20 Am. L. Rev. 95.

§ 731. **Objection to competency for want of belief—How raised.**—The presumption is that a witness living in a Christian country believes in the Christian religion; hence, the *burden rests upon the one objecting* to a witness because he is insensible to the obligation of an oath, or on account of atheism or other similar cause, to make good the objection by proof.¹ Nor can any volunteer raise the question; the objection must be made by the adverse party.² When the objection is properly raised, the prior declarations of the witness may be shown by those who have heard such declarations, for the purpose of proving his incompetency.³ By the weight of authority in this country, a witness will not be compelled to submit to an examination for the purpose of showing

his belief, or want of belief. It is held that to require such a disclosure would be foreign to the spirit of our institutions,⁴ although, if the witness desires to state or explain his belief, he may do so;⁵ and if his statement stands uncontradicted, he is permitted to testify.⁶ According to some of the English cases, the witness might himself be examined. But, according to those authorities, he could only be asked whether he believed in a God, the avenger of falsehood, and also to designate a mode of swearing which would be binding on his conscience. On compliance with this, he could not be asked whether he considered any other mode more binding.⁷

1, *Donnelly v. State*, 2 Dutch. (N. J.) 601; *Com. v. Winemore*, 2 Brewst. (Pa.) 378. See note, 92 Am. Dec. 473.

2, 1 Law Reporter (Boston) 347.

3, *Anderson v. Maberry*, 2 Heisk. (Tenn.) 653; *Beardsley v. Foot*, 2 Root (Conn.) 399; *Curtiss v. Strong*, 4 Day (Conn.) 51; 4 Am. Dec. 179; *Smith v. Coffin*, 18 Me. 157; 1 Law Reporter (Boston) 346. Such declarations should be received with caution, *Thurston v. Whitney*, 2 Cush. 104.

4, *Donkle v. Kohn*, 44 Ga. 266; *Carter v. State*, 63 Ala. 52; 35 Am. Rep. 4; *Curtiss v. Strong*, 4 Day (Conn.) 51; 4 Am. Dec. 179; *Atwood v. Welton*, 7 Conn. 66; *Com. v. Smith*, 2 Gray 516; *Com. v. Burke*, 16 Gray 33.

5, *United States v. White*, 5 Cranch C. C. 38.

6, *Arnd v. Amling*, 53 Md. 192; *United States v. White* 5 Cranch C. C. 38.

7, Best Ev. sec. 161.

1732. Former rule—How changed by statutes.—There is a marked tendency

toward the relaxation of the strictness of the common law rules on the subject; and *statutes* have been quite generally adopted repealing or modifying the rule which formerly excluded, as incompetent, those who did not believe in the existence of a God. By the English statute of 1869, it was provided that, if any witness objected to taking the oath, or if it should be objected that he was incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration; and then, if false evidence be willfully and corruptly given by him, he shall be liable to indictment for perjury.¹ In some of the states in this country, it is provided by constitution or statute that no person shall be rendered incompetent to give evidence in consequence of his opinions on the subject of religion;² in others, the statutes have so far modified the common law rule as to require, as the condition of competency, no more than a belief in the *existence* of God.³ While in New York, the condition is that the witness shall believe in the existence of a Supreme Being who will punish false swearing.⁴

1, 32 & 33 Vict. ch. 68 sec. 21.

2, Arizona, Rev. Stat. 1887 sec. 1866; California, Hittell's Code sec. 11, 879; People v. Copsey, 71 Cal. 548; Florida, Laws 1890-91 ch. 4036 p. 62; Illinois, Const. 1870 art. II sec. 3; Indiana, Rev. Stat. secs. 52, 513; Iowa, Const. art. I

sec. 4, Code 1888 sec. 4887 note; Kentucky, Civil Code 1895 sec. 605; Bush v. Com., 80 Ky. 244; Maine, Rev. Stat. 1883 p. 707 sec. 92; Massachusetts, Pub. Stat. 1882 ch. 169 sec. 18; Michigan, Ann. Stat. 1882 sec. 7546; People v. Jenness, 5 Mich. 505; Minnesota, Rev. Stat. 1894 secs. 5658; Mississippi, Ann. Code 1892 sec. 1742; Ohio, Rev. Stat. 1890 sec. 5240; Tennessee, Code 1884 sec. 4560; Texas, Rev. Stat. 1879 art. 2249, and Wilson's Crim. Code art. 736; Vermont, Rev. Stat. 1880 sec. 1007; Virginia, Perry's Case, 3 Gratt. (Va.) 635; Wisconsin, Const. art. I sec. 19.

3, Connecticut, Gen. Stat. 1888 sec. 1898; New Hampshire, Pub. Stat. 1891 ch. 622 sec. 12; Missouri, Stat. 1835 p. 419 sec. 7.

4, New York, Rev. Stat. (3d ed.) vol. II p. 505.

1733. Oath or equivalent still required.—Although in many jurisdictions all religious tests are dispensed with, it is the uniform policy of the law to require either the administration of an oath to the witness or that some affirmation or declaration be made as an equivalent.¹ If the oath is not taken or the affirmation made until part of the testimony is given, only that part of the evidence which follows the oath or affirmation is competent.² It is the common law rule, and one which has been declared in the statutes of some of the states, that the court, in its discretion, may inquire of any witness what are the ceremonies observed in swearing which he deems most obligatory, and may adopt such forms.³ For example: "Jews may be sworn on the Pentateuch with covered head;⁴ Mahometans, upon the Koran;⁵ Gentoos, by touching the foot of a Brahmin (or priest);⁶

Chinese, by the ceremony of killing a cock, or breaking a saucer, the witness declaring that, if he speaks falsely, his soul will be similarly dealt with;⁷ a Scotch covenanter and a member of the Scottish Kirk, by holding up the hand, without kissing the book;⁸ Quakers and others, who profess to entertain conscientious scruples against taking an oath in the usual form, are allowed an affirmation, *i. e.*, a solemn religious asseveration that their testimony shall be true.⁹ A wilful false oath under such circumstances is perjury."¹⁰

1, Com. v. Winnemore, 2 Brewst. (Pa.) 378; Priest v. State, 10 Neb. 393.

2, Com. v. Keck, 148 Pa. St. 639.

3, Omychund v. Barker, 1 Atk. 21; Willes 543; People v. Green, 99 Cal. 564, where it was held not to be a reversible error to refuse to administer a special oath to a Chinese witness.

4, Omychund v. Barker, 1 Atk. 21; Willes 543. Christians are sworn on the Bible, R. v. Gilham, 1 Esp. 285; or upon the old testament, if they prefer, Edmonds v. Rowe, Ry. & M. 77.

5, Morgan's Case, 1 Leach Cr. Cas. 54.

6, Omychund v. Barker, 1 Atk. 21; Willes 543.

7, R. v. Enthebman, Car. & M. 248.

8, Mildrone's Case, 1 Leach Cr. Cas. 412; Walker's Case, 1 Leach Cr. Cas. 498; Mee v. Reid, Peake 33. Ordinarily American witnesses may be sworn in the same way, Gill v. Caldwell, 1 Ill. 28; Doss v. Birks, 11 Humph. (Tenn.) 431. But it is different, if objection be made at the time, McKinney v. People, 7 Ill. 540.

9, Atkinson v. Everett, Cowp. 382. Under a Massachusetts statute, the privilege was formerly confined to Quakers

alone, *United States v. Coolidge*, 2 Gall. (U. S.) 364. But this privilege extends only to those who have conscientious scruples against an oath, *Williamson v. Carroll*, 1 Har. (N. J.) 217. In *Com. v. Buzzell*, 16 Pick. 153, Roman Catholics were sworn on the Holy Evangelists.

10, *Rapalje Witnesses* sec. 235; *Sells v. Hoare*, 3 Brod. & B. 232. See note, 92 Am. Dec. 473.

1734. Infamy as a ground of incompetency.—Among the persons who, by the common law, were deemed insensible to the obligation of an oath and incompetent to testify were those who had been convicted of infamous crimes.¹ Although the principal ground for the exclusion of witnesses of this character was that they were deemed not worthy of credit in the administration of justice, another reason sometimes adduced was that it was a proper incident to punishment for infamous crimes.² The disqualification did not arise, however, unless the witness had been *actually convicted* and adjudged guilty of a crime.³ The witness was not incompetent, within the meaning of the rule just stated, although he had confessed his crime or although he had gained the reputation of being immoral and unworthy of credit,⁴ or although a verdict had been rendered finding him guilty of a crime, which was not followed by judgment, as in such case a motion in arrest of judgment or one setting aside the verdict might be granted.⁵ This disqualification has been very generally *removed by statutes*, and it is therefore un-

neccessary to enter into any investigation as to the classes of offenses to which this penalty attached at common law. The subject was involved in much obscurity, but it is sufficient to add that the following are some of the offenses, conviction of which rendered the defendant infamous under the old rule: forgery,⁶ burglary,⁷ perjury and subornation of perjury,⁸ grand and petit larceny,⁹ suppression of testimony by bribery or conspiracy to procure the absence of a witness, or a conspiracy to accuse one of crime,¹⁰ receiving stolen goods,¹¹ conspiracy to defraud creditors,¹² barratry¹³ and assault, when the punishment was of an infamous nature.¹⁴

1, *Com. v. Knapp*, 9 Pick. 495; *Com. v. Gorham*, 99 Mass. 420; *Dickinson v. Duston*, 21 Mich. 561; *Glenn v. Clove*, 42 Ind. 62. On this general subject, see notes, 73 Am. Dec. 775; 33 Am. Rep. 639.

2, *Best Ev. sec. 141*. But see, *Chase v. Blodgett*, 10 N. H. 22.

3, *R. v. Inhabitants*, 8 East 77; *Skinner v. Perot*, 1 Ashm. (Pa.) 57; *People v. Whipple*, 9 Cow. 707; *Blaufus v. People*, 69 N. Y. 107; *Jackson v. Osborn*, 2 Wend. 555; *Cushman v. Loker*, 2 Mass. 106; *Lipe v. Eisenlerd*, 32 N. Y. 229, 237; *Jones v. State*, 32 Tex. Crim. Rep. 135; *Ville de Varsovie*, 2 Dods. 186; *State v. Valentine*, 7 Ired. (N. C.) 225; *State v. Patterson*, 35 S. C. 279, rule modified by statute.

4, *Ville de Varsovie*, 2 Dods. 174; *State v. Randolph*, 24 Conn. 363; *Craft v. State*, 3 Kan. 450; *Smithwick v. Evans*, 24 Ga. 461; *Fay v. Harlan*, 128 Mass. 244; *Com. v. Gorham*, 99 Mass. 420.

5, *Fay v. Harlan*, 128 Mass. 244. See cases cited in notes 3 and 4 *supra*.

- 6, R. v. Doris, 5 Mod. 74.
7, People v. Park, 41 N. Y. 21; Taylor v. State, 6 Ala. 164.
8, Co. Litt. 6 b.
9, Taylor v. State, 62 Ala. 164; Sylvester v. State, 71 Ala. 17; State v. Gardner, 1 Root (Conn.) 485; Com. v. Keith, 8 Met. 531; Pendock v. Mackinder, Willes 665; James v. Bostwick, 1 Wright (Ohio) 142. But see, Free v. State, 1 McMull. (S. C.) 494. The New York courts, under a statute, hold petit larceny not an infamous crime, Shay v. People, 22 N. Y. 316; Carpenter v. Nixon, 5 Hill 260.
10, Clancey's Case, Fortes 208; Bushell v. Barrett, Ryan & M. 434; R. v. Priddle, Leach Cr. Cas. 442; Crowther v. Hopwood, 2 Stark. 21; Ville de Varsovie, 2 Dods. 191.
11, Com. v. Rogers, 7 Met. 500.
12, United States v. Porter, 2 Cranch C. C. 60.
13, R. v. Ford, 2 Salk. 690.
14, United States v. Brockins, 3 Wash. (U. S.) 99.

§ 735. **Same—Effect of crime committed in foreign countries.**—By the weight of authority, a witness is not rendered incompetent by proof that he has been adjudged guilty of an infamous crime in a foreign country or sister state. This disqualification is not founded on natural law, and, being penal in its character, is strictly construed.¹ But the judgment of a foreign court may be given its due weight, if properly proved, *to affect the credibility* of the witness;² and, for this purpose, the proof is not confined to conviction of infamous crimes. It may be shown that the witness has been adjudged guilty of minor offenses.³

1, *Logan v. United States*, 144 U. S. 263; *Com. v. Green*, 7 Mass. 515, 539; *Sims v. Sims*, 75 N. Y. 466; *National Trust Co. v. Gleason*, 77 N. Y. 400, 410; *Campbell v. State*, 23 Ala. 44; *Chase v. Blodgett*, 10 N. H. 22; *Uhl v. Com.*, 6 Gratt. (Va.) 706. But see, *State v. Foley*, 15 Nev. 64; 37 Am. Rep. 458; *State v. Chandler*, 3 Hawks (N. C.) 393. See note, 33 Am. Rep. 639.

2, *Com. v. Knapp*, 9 Pick. 496, and cases last cited.

3, For example: adultery, *Little v. Gibson*, 39 N. H. 505; conspiracy to defraud creditors, *Bickel v. Fasig*, 33 Pa. St. 463; dealing faro, *Holloway v. Com.*, 11 Bush (Ky.) 344; embezzlement, *Schuylkill v. Copeley*, 67 Pa. St. 386; maintaining a house of ill fame, *Deer v. State*, 14 Mo. 348; malicious obstruction of the operation of cars on a railroad, *Com. v. Dame*, 8 Cush. 384; obtaining goods by false pretenses, *Utley v. Merrick*, 11 Met. 302; petit larceny, *Carpenter v. Nixon*, 5 Hill 260; *Shay v. People*, 22 N. Y. 317; *Pruit v. Miller*, 3 Ind. 16; *Welsh v. State*, 3 Tex. App. 114; *Contra, Lyford v. Farrar*, 31 N. H. 314; *Sylvester v. State*, 71 Ala. 17; *State v. Gardner*, 1 Root (Conn.) 485; *Com. v. Keith*, 8 Met. 531; unlawfully cutting timber, *Holler v. Pfirih*, 2 Pen. (N. J.) 723; violating city ordinance, *Cheatam v. State*, 59 Ala. 40. Many other cases might be cited, but these serve to illustrate the rule.

§ 736. Disability — How proved — How removed.—At common law, the only mode of proving the conviction rendering a witness incompetent was by the production of the original record, or a duly authenticated copy.¹ But in some jurisdictions, it is provided by *statutory regulation* that, for the purpose of affecting the credibility of the witness, his conviction may be proved either by the record or by his own cross-examination; and in such cases, the party cross-examining is not bound by the answers of the witness.²

The *disability* now under discussion may be removed either by the granting of a pardon, or by the reversal of a judgment.³ The proof of such pardon or reversal must be by the proper documentary evidence, under the general rule that the best evidence must be produced. A *pardon* restores the competency of the witness, although he has suffered the entire punishment imposed;⁴ the same is true, even if the pardon contains a provision that it shall not be so construed as to relieve the party from any legal disabilities,⁵ or although the pardon was granted to enable the witness to testify in a given case.⁶ But the pardon does not restore the witness to competency in those cases where he is convicted under a *statute which expressly prescribes the disability to testify* as an incident of the judgment, since it is competent for the legislature to thus modify the general rules of evidence.⁷ There is a conflict as to whether this disability is removed by *serving out the sentence* imposed by the court. The weight of authority seems to hold that the disability is removed in this manner,⁸ but there are authorities that sanction the opposite rule.⁹ But this and similar questions have been rendered of little consequence in almost all jurisdictions by statutes abolishing the rule rendering persons incompetent by reason of conviction of crime, however infamous.¹⁰ These statutes generally allow the introduc-

tion of evidence to show such conviction, however, for the purpose of affecting the credibility of the witness.

1, *Clarke v. Hall*, Har. & McH. (Md.) 378; *R. v. Inhabitants*, 8 East 76; *State v. Darmrey*, 48 Me. 327; *Newcomb v. Griswold*, 24 N. Y. 298; *Farley v. State*, 57 Ind. 331; *Hall v. Brown*, 30 Conn. 551; *People v. Herrick*, 13 Johns. 82; 7 Am. Dec. 364; *Bartholomew v. People*, 104 Ill. 601; 44 Am. Rep. 97; *Com. v. Gallagher*, 126 Mass. 54; *Johnson v. State*, 48 Ga. 116; *Dickinson v. Dustin*, 21 Mich. 561.

2, See the statutes of the jurisdiction.

3, *Ex parte Garland*, 4 Wall. 333; *Osborn v. United States*, 91 U. S. 474; *Knote v. United States*, 95 U. S. 153, and case there cited; *Baum v. Clause*, 5 Hill 196; *Hunnicutt v. State*, 18 Tex. App. 499; *Klein v. Dinkgrave*, 4 La. An. 540; *Wood v. Fitzgerald*, 3 Ore. 568; *Hester v. Com.*, 85 Pa. St. 154; *Perkins v. Stevens*, 24 Pick. 277; *Yarborough v. State*, 41 Ala. 405; *Com. v. Ohio Ry. Co.*, 1 Grant Cas. (Pa.) 329. But a conditional pardon does not restore competency, *Carr v. Smith*, 9 Tex. App. 635; 53 Am. Rep. 395; *McGee v. State*, 29 Tex. App. 596.

4, *Logan v. United States*, 144 U. S. 263; *Boyd v. United States*, 142 U. S. 450; *Bennett v. State*, 24 Tex. App. 73; 5 Am. St. Rep. 875. The motive that led the executive to grant the pardon can not be questioned, *Martin v. State*, 21 Tex. App. 1. See article, 41 Cent. L. Jour. 276.

5, *People v. Pease*, 3 Johns. Cas. (N. Y.) 333.

6, *Boyd v. United States*, 142 U. S. 450.

7, *Dover v. Maestaer*, 5 Esp. 92, 94; *R. v. Ford*, 2 Salk. 690; *Foreman v. Baldwin*, 24 Ill. 298; *Houghtaling v. Kelderhouse*, 1 Park. Cr. (N. Y.) 241; *Evans v. State*, 7 Baxt. (Tenn.) 12. But this exception does not exist under common law, in the absence of statute, *Dover v. Maestaer*, 5 Esp. 92, 94. In some states, by statutory regulation, those convicted of perjury are not restored to competency by a pardon. In a few other states, the same provision exists as to those convicted of a capital crime or of such felonies as burglary, forgery, rape, arson, counterfeiting, bigamy and

sodomy. The statutes of the jurisdiction should be consulted in each case.

8, Carr v. Smith, 19 Tex. App. 635; 53 Am. Dec. 395; Rapalje Witnesses sec. 19; Underhill Ev. sec. 320. See also, 1 Phill. Ev. (3d ed) 23.

9, United States v. Brown, 4 Cranch C. C. 607; State v. Benoit, 16 La. An. 273.

10, See the statutes of the jurisdiction.

§ 737. Incapacity as a ground of incompetency — Idiots — Mutes.—It is too clear a proposition to call for any discussion that the liberty or property of the citizen should not depend upon the testimony of those who are so wanting in understanding that they cannot remember or cannot form any conception of right and wrong. It would obviously be an idle ceremony to administer an oath to an idiot or to one hopelessly insane.¹ "It makes no difference from what cause this defect of understanding may have arisen; or whether it be temporary and curable or permanent; whether the party be hopelessly an idiot or maniac, or only occasionally insane as a lunatic, or be intoxicated, or whether the defect arises from mere immaturity of intellect, as in the case of children. *While the deficiency of understanding exists*, be the cause of what nature soever, the person is not admissible to be sworn as a witness. But, if the cause be temporary, and a lucid interval should occur, or a cure be effected, the competency also is

restored."² The testimony of either an idiot or a lunatic may, however, be received, if he appears to the court to have sufficient understanding to comprehend the obligation of an oath, and to be able to give correct answers to the questions put. The judge is to determine the competency by examining the witness himself or upon the testimony of third persons.³ Although it was formerly presumed that *persons deaf and dumb* from birth were idiots, and therefore incompetent, within the meaning of this rule,⁴ no such presumption now exists. Mr. Taylor in his work on evidence gives an instance in which a cause was decided solely on the testimony of witnesses who were deaf and dumb.⁵ When such a witness is produced, the court may ascertain whether he has the requisite intelligence; and the judge will allow the witness to adopt such mode of communicating his ideas, whether by signs or writing, as, under the circumstances, may be deemed most satisfactory.⁶

1, Coleman v. Com., 25 Gratt. (Va.) 865; Phebe v. Prince, Walk. (Miss.) 131; Hartford v. Palmer, 16 Johns. 143. See sec. 741 *infra*.

2, Greenl. Ev. sec. 365; Coleman v. Com., 25 Gratt. (Va.) 865; Cannady v. Lynch, 27 Minn. 435; Hartford v. Palmer, 16 Johns. 143, drunkenness. See sec. 741 *infra*.

3, Taken in part from 1 Whart. Cr. L. sec 752. See also cases there cited.

4, 1 Hale P. C. 34; R. v. Steel, 1 Lee 451, where the accused, a mute, was convicted. See note, 24 L. R. A. 126.

5, Tayl. Ev. sec. 1376, note; State v. Howard, 118 Mo. 127.

6, Com. v. Hill, 14 Mass. 207; State v. De Wolf, 8 Conn. 93; 20 Am. Dec. 90; People v. McGee, 1 Den. 19; Snyder v. Nations, 5 Blackf. (Ind.) 295; Morrison v. Lennard, 3 Car. & P. 127; State v. Weldon, 39 S. C. 318; Ruston's Case, 1 Leach Cr. C. 408.

§ 738. Incapacity—Want of age.—A child of tender years may be incompetent to testify, either on the ground that he is not sufficiently matured to state with reasonable correctness what he has seen or heard, or because he does not comprehend the obligation of an oath. In the early English law, there was no little confusion among the authorities as to the admissibility of evidence of this character. There was a tendency on the part of some authorities to adopt the maxim, *minor jurare non potest*, and to arbitrarily designate some age below which children should not be admitted as witnesses.¹ In a few other cases in certain classes of criminal trials, all rules of evidence were violated by the admission of the testimony of children without oath.² But it has now long been settled that there is *no certain age* at which the dividing line between competency and incompetency may be drawn. The competency of the witness depends on intelligence, rather than age. In the leading English case on the subject, it was determined that the admissibility of the testimony of children depends "on the sense and reason

that they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court."³ At the age of fourteen, children are presumed to have sufficient intelligence to testify and to comprehend the nature of an oath, unless the circumstances of the case are such as to raise a doubt.⁴ If the child is under fourteen, there is no presumption in favor of competency; and the court, in its discretion, will determine whether the child has sufficient intelligence to testify and to comprehend the obligation of an oath.⁵ There are instances on record in which the testimony of children of five and six years of age has been received;⁶ and it is common practice to admit the testimony of children eight and nine years of age, where they seem to understand the obligation of an oath.⁷

1, Co. Lit. 172 b, 247 b; R. v. Travers, 2 Strange 700; 1 Hale P. C. 302; *id.* 634. On the general subject of this and succeeding sections see articles, 3 Cent. L. Jour. 491; 36 *id.* 339.

2, 4 Bl. Comm. 214; 2 Hale P. C. 283, 284.

3, R. v. Brazier, 1 Leach Cr. C. 199.

4, Den v. Vandlere, 2 South. (N. J.) 589; Brown v. State, 2 Tex. App. 115.

5, Jackson v. Gridley, 18 Johns. 98; State v. Richie, 28 La. An. 327; 26 Am. Rep. 100; Van Pelt v. Van Pelt, 2 Penn. (N. J.) 486; Moore v. State, 79 Ga. 498; Davidson v. State, 39 Tex. 129; McAmore v. Wiley, 49 Ill. App. 615; Vincent v. State, 3 Heisk. (Tenn.) 120; Crowner v. Crowner, 44 Mich. 180; 38 Am. Rep. 245; Hughes v. Detroit Ry. Co., 65 Mich. 10; State v. Whittier, 21 Me. 341; 38 Am. Dec.

272; *State v. Doyle*, 107 Mo. 36; *Flanagin v. State*, 25 Ark. 92; *State v. Severson*, 78 Iowa 653; *McKelton v. State*, 88 Ala. 181. Under the Missouri statutes, a child under ten years of age is presumed to be incompetent, *Ridenhour v. Kansas City Ry. Co.*, 102 Mo. 270. See notes, 16 Am. St. Rep. 31; 19 L. R. A. 605-610.

6, *R. v. Holmes*, 2 Fost. & F. 788. Where the child was but four years old, the testimony was rejected, *R. v. Pike*, 3 Car. & P. 598; testimony has been received where children were seven years of age, *Washburn v. People*, 10 Mich. 372; *State v. Morea*, 2 Ala. 275; the testimony of a five year old child may be received as to an indecent assault upon herself, *State v. Juneau*, 88 Wis. 180; the testimony of a six year old child was held incompetent in *Johnson v. State*, 76 Ga. 76; while that of a five year old child has been received, *Wheeler v. United States*, 159 U. S. 523.

7, *Washburn v. People*, 10 Mich. 372; *McGuire v. People*, 44 Mich. 286; *Draper v. Draper*, 68 Ill. 17; *Brown v. State*, 2 Tex. App. 122; *State v. Richie*, 28 La. An. 327; 26 Am. Rep. 100; *Givins v. Com.*, 29 Gratt. (Va.) 835; *McGuff v. State*, 88 Ala. 150; *Blackwell v. State*, 11 Ind. 196; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Com. v. Hutchinson*, 10 Mass. 225; *State v. Levy*, 23 Minn. 104; *R. v. Brasier*, 1 Lee 199; 1 East P. C. 443; *Jackson v. Gridley*, 18 Johns. 98; *Moore v. State*, 79 Ga. 498.

§ 739. Mode of determining capacity of children — The tests to be applied.—

It is the duty of the court to examine the child, if the question of competency arises, and to determine, in the exercise of a sound discretion, whether the witness has the requisite understanding.¹ But the court may also allow the attorney to make inquiry.² The examination should show that the child has some understanding of the punishment which may result from false swearing,³ but the

courts have not insisted on a very definite or exact knowledge of this subject.⁴ Indeed, if such accuracy were insisted upon, it might often exclude the testimony of adults. It has been held sufficient where the child stated that he knew that it was wrong to tell a lie, and that he would be punished if he did so,⁵ or where the child used language equivalent to saying that he would be sent to hell for false swearing.⁶ In some English cases, the judges have, in the exercise of their discretion, *postponed the trial* to give an opportunity to instruct a child, the principal witness, as to the nature of an oath.⁷ But in other cases, it has been held that the child should understand the binding obligation of an oath from the general course of religious education, and not merely from instruction given for the purpose of the trial.⁸

1, *People v. McNair*, 21 Wend. 608; *Carter v. State*, 63 Ala. 52; 35 Am. Rep. 4; *State v. Doyle*, 107 Mo. 36; *State v. Juneau*, 88 Wis. 180; *Davis v. State*, 31 Neb. 247. See also cases cited under last section.

2, *Carter v. State*, 63 Ala. 52; 35 Am. Rep. 4 and note.

3, *Williams v. State*, 12 Tex. App. 127; *Carter v. State*, 63 Ala. 52; 35 Am. Rep. 4 and note; *R. v. Pike*, 3 Car. & P. 598; *Davis v. State*, 31 Neb. 240; *Com. v. Lynes*, 142 Mass. 577; 56 Am. Rep. 709; *State v. Michael*, 37 W. Va. 565; *McGuire v. People*, 44 Mich. 286; 38 Am. Rep. 265.

4, *State v. Levy*, 23 Minn. 104; *Longston v. State*, 3 Heisk. (Tenn.) 414; *Blackwell v. State*, 11 Ind. 196; *Davidson v. State*, 39 Tex. 129.

5, *State v. Levy*, 23 Minn. 104; *McAmore v. Wiley*, 49 Ill. App. 615; *Parker v. State*, 33 Tex. Cr. Rep. 111.

6, *Longton v. State*, 3 Heisk. (Tenn.) 414; *Com. v. Carey*, 2 Brewst. (Pa.) 404; *Draper v. Draper*, 68 Ill. 17.

7, *R. v. White*, 1 Leach Cr. C. 430 note a; *R. v. Wade*, 1 Moody Cr. C. 86. See also, *Com. v. Lynes*, 142 Mass. 577, where the child was instructed during a recess of the court.

8, *R. v. Williams*, 7 Car. & P. 320; *R. v. Pike*, 3 Car. & P. 598; *R. v. Nicholas*, 2 Car. & K. 246, but it was added in the last case that, where the intellect was sufficiently matured and the education had been neglected, a postponement might be very proper.

§740. Degree of credit to be given such testimony.—Although, in order to prevent a failure of justice, it is often necessary to receive the evidence of children of tender age, every practitioner of experience is sensible of the embarrassments and danger which attend the admission of such evidence. It is true, it may be urged, that the natural language of the child is that of innocence and truth, and that its testimony is apt to be free from the prejudice or sinister motives which too often affect the testimony of adults. On the other hand, it may be urged with equal force that this class of testimony is open to several serious objections. There is the uncertainty whether the witness has a proper conception of the obligation of an oath. Then there is the still greater danger that such testimony may have been prompted and inspired by unscrupulous and interested persons. Says Mr. Stephen: "A child will have been taught to say that, if it tells a lie, it will go to the bad

place when it dies (which is usually taken to show that it knows the meaning of an oath) long before it has any real notion of the practical importance of its evidence in a temporal point of view; and also long before it has learned to distinguish between its memory and its imagination, or to understand, in the least degree, what is meant by accuracy of expression. It is hardly possible to cross-examine a child, for the test is too rough for an immature mind. However gently the questions may be put, the witness grows confused and frightened, partly by the tax on its memory, partly by the strangeness of the scene; and the result is that its evidence goes to the jury practically unchecked, and has usually greater weight than it deserves, for the sympathies of the jury are always with it. This is a considerable evil, for in infancy the strength of the imagination is out of all proportion to the power of the other faculties; and children constantly say what is not true, not from deceitfulness, but simply because they have come to think so, by talking or dreaming of what has passed. The evil, however, is one which the law cannot remedy. It would be a far greater evil to make children incompetent witnesses up to a certain age. The only remedy is that judges should insist to juries more strongly than they generally do on the unsatisfactory nature of the evidence of children, and on the

danger of being led by sympathy to trust in it."¹

1, General View of the Criminal Law of England by J. F. Stephen.

§ 741. Want of capacity — Insanity.—

At common law, lunatics were formerly classed with idiots, and excluded from the witness box entirely. But this sweeping rule has been greatly modified, and now, both in England and in this country, lunatics are allowed to testify, if they appear to the court to have sufficient understanding to apprehend the nature and obligation of an oath, and to be capable of giving a correct account of the matter that they have seen or heard, and in reference to which they have been called to testify.¹ But those who, by reason of *permanent insanity* are unable to comprehend the obligation of an oath, are incompetent to testify.² One who has been insane is not, however, excluded on this ground, if his testimony is offered during a *lucid interval*.³ But the party seeking to introduce such testimony must show that the witness is competent at that time, as insanity is presumed to continue as a mental state, when it has once existed, until the contrary is shown.⁴ By the weight of authority, such a witness may testify during a lucid interval, even as to transactions which happened during his insanity. Under such circumstances, the fact of insanity

may, of course, be shown, but it affects the credibility and not the competency of the witness.⁶ Although it has been maintained by high authority that the testimony of a *monomaniac* should not be admitted,⁶ yet the weight of authority seems to sustain the view that monomania upon a subject, not in issue, does not necessarily render the witness incompetent if, in the opinion of the court, he understands the nature and obligation of an oath, and can give a correct account of what he has seen or heard. In such cases, the question of competency is for the court, and that of credibility for the jury.⁷ Difficulty may arise in determining what *degree of mental unsoundness* is necessary to render the witness incompetent. On this subject a learned writer says: "Calm reflection will convince that, if mental alienation is to be retained in our law as a ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness so as to make him understand that he is in a court of justice, and expected to speak the truth. Any eccentricities or aberrations which fall short of this are surely only matter of comment to the jury, as to the reliance to be placed on his testimony."⁸

1, *Mayor v. Caldwell*, 81 Ga. 76; *Kendall v. May*, 10 Allen 59; *Coleman v. Com.*, 25 Gratt. (Va.) 865; 18 Am. Rep. 711; *Worthington v. Mencer*, 98 Ala. 310.

2, *Livingston v. Kiersted*, 10 Johns. 362; *Evans v. Het-tich*, 7 Wheat. 453; *Lopez v. State*, 30 Tex. App. 487; 28

Am. St. Rep. 935 and extended note. See also article, 40 Cent. L. Jour. 133.

3, Evans v. Hettich, 7 Wheat. 453; Campbell v. State, 23 Ala. 44; Holcomb v. Holcomb, 28 Conn. 177; Cannody v. Lynch, 27 Minn. 435; Kendall v. May, 10 Allen 59.

4, Armstrong v. Timmons, 3 Har. (Del.) 342; Spittle v. Walton, L. R. 11 Eq. Cas. 420; Hoyt v. Adece, 3 Lans. (N. Y.) 173. But see, State v. Kelley, 57 N. H. 549, 554.

5, Holcomb v. Holcomb, 28 Conn. 177; Sarback v. Jones, 20 Kan. 497; Endel v. Wall, 16 Fla. 786.

6, Waring v. Waring, 12 Jur. 947; Roscoe Cr. Ev. 128.

7, R. v. Hill, 15 Jur. 470; 5 Eng. L. & Eq. 547; 5 Cox Cr. C. 259; District of Columbia v. Armes, 107 U. S. 519; Holcomb v. Holcomb, 28 Conn. 177; Coleman v. Com., 25 Gratt. (Va.) 865; Ray Med. Jur. sec. 304.

8, Best Ev. sec. 150; District of Columbia v. Armes, 107 U. S. 519; Coleman v. Com., 25 Gratt. (Va.) 865; Clements v. McGinn, (Cal.) 33 Pac. Rep. 920.

§ 742. Same — Drunkenness — Defective memory, etc.—It is no objection to the competency of a witness that he is a person of intemperate habits,¹ or even that, on account of habitual drunkenness, he is under guardianship.² It is for the court to determine, from the present conduct and appearance of the witness, whether he is in such a state as to comprehend the obligations of the oath, and to testify intelligibly, or whether he should be excluded.³ It is not necessary to discuss the proposition that a witness is not to be excluded as incompetent by reason of the fact that his *memory* is somewhat *defective*, or because his *means of knowledge* may

not be equal to that of other persons who might have been called as witnesses.⁴ Obviously these are objections which effect the *credibility* and not the competency of the witness.⁵

- 1, Thayer v. Boyle, 30 Me. 475.
- 2, Gebhard v. Shindle, 15 Serg. & R. (Pa.) 235, 238.
- 3, Hartford v. Palmer, 16 Johns. 143. See also, Gould v. Crawford, 2 Pa. St. 89; Cannady v. Lynch, 27 Minn. 435.
- 4, Walker v. Blassingame, 17 Ala. 810; Fulton v. Macracken, 18 Md. 528; Lewis v. Eagle Ins. Co., 10 Gray 508. See article, 19 Am. L. Rev. 583.
- 5, See secs. 903 *et seq infra*.

§ 743. **Interest in the result.**— While the learned jurists of the common law never wearied in their encomiums upon the right of trial by jury, there is, after all, perceptible in the rules of evidence which they established a profound distrust of the capacity of jurors to perform their function. Undoubtedly the policy of excluding arbitrarily large classes of witnesses, as wholly incompetent to testify, rested upon the belief that jurors could not properly discriminate between the weight of testimony which came from an infamous or an interested witness, and that against which no such objection existed. In the adoption of statutes changing the common law rules of evidence, both in England and the United States, there has been a uniform tendency to reject the arbitrary rules by

which certain classes of witnesses were declared wholly incompetent. The law now fully recognizes the inherent infirmity of the testimony of parties and of those directly interested in the result. But the modern policy is to admit the testimony of these and of other classes of witnesses, formerly excluded, leaving a much wider discretion in the court or jury to discriminate between evidence which is satisfactory and that which is unworthy of credit.¹ In the old works on evidence, there were few subjects more exhaustively discussed than that of the competency of witnesses; and the rule which excluded witnesses directly interested in the result became, together with the collateral questions arising out of it, one of the most complicated of the common law. The learned and ingenious discussions of this subject which we find constantly recurring in the old reports have now only a historical value; and we shall only summarize in the briefest manner these rules which have now become obsolete.

1. *New Orleans, J. & G. N. Ry. Co. v. Allbritton*, 38 Miss. 242; 75 Am. Dec. 98; *Dodd v. Moore*, 91 Ind. 522; *Prowattain v. Tindall*, 80 Pa. St. 295; *Riden v. People*, 110 Ill. 11; *Marquette, H. & O. Ry. Co. v. Kirkwood*, 45 Mich. 51. See note, 86 Am. Dec. 329; also article, 4 Am. L. Reg. N. S. 74.

§744. Nature of the interest necessary to disqualify—How removed.—To come within the rule, it was necessary that

the disqualifying interest should be "some legal, certain and immediate interest, however minute, either in the event of the cause itself, or in the record as an instrument of evidence in support of his own claims in a subsequent action."¹ Unless there was such an interest, a mere interest in the question in litigation or a bias arising from such interest was not a disqualification.² The interest had to be an *actual legal existing interest*, and not one merely expected or imaginary.³ But if the interest was of this character, it was *immaterial how slight* such interest actually was. The test was not the magnitude, but the nature of the interest.⁴ Witnesses who were incompetent by reason of interest in the result might, by a *release of such interest*, be placed on the same footing as other witnesses.⁵ If the interest was vested in the witness himself, he might divest it by a release. If it consisted of a liability over, his competency might be restored by a release from the person to whom he was liable.⁶ There were other well recognized modes of removing the disqualification of interest, as by indemnifying the witness against liability,⁷ payment of a contingent liability,⁸ judgment for or against the witness,⁹ disclaimer of title¹⁰ and other modes, none of which it is necessary to discuss in view of the enabling statutes which now generally exist.

1, 1 Greenl. Ev. sec. 386; *Pogue v. Joyner*, 6 Ark. 241; 42 Am. Dec. 603; *Grommes v. Trust Co.*, 147 Ill. 634; 37 Am. St. Rep. 248; *Highberger v. Stiffler*, 21 Md. 338; 83 Am. Dec. 593; *Poe v. Dorrah*, 20 Ala. 288; 56 Am. Dec. 196; *MacKinley v. McGregor*, 3 Whart. (Pa.) 369; 31 Am. Dec. 522. But if an interested party is offered as a witness to sustain the party whose interest is adverse to his own, he is competent, *Sparhawk v. Sparhawk*, 10 Allen 155. See note, 44 Am. Dec. 210.

2, *Bent v. Baker*, 3 T. R. 27; *Masters v. Varner's Ex.*, 5 Gratt. (Va.) 168; 50 Am. Dec. 114; *Riddle v. Dixon*, 2 Pa. St. 372; 44 Am. Dec. 207; *Parker v. Griswold*, 17 Conn. 288; 42 Am. Dec. 739; *Elliott v. Porter*, 5 Dana (Ky.) 299; 30 Am. Dec. 689; *Rowley v. Bigelow*, 12 Pick. 307; 23 Am. Dec. 607; *People v. Cunningham*, 1 Den. 524; 43 Am. Dec. 709. Thus, where the action was against an underwriter on a policy of insurance, another underwriter on the same policy was a competent witness for the defendant, *Bent v. Baker*, 3 T. R. 27. For other illustrations, see Greenl. Ev. sec. 389.

3, *Cassiday v. McKenzie*, 4 Watts & S. (Pa.) 282; 39 Am. Dec. 76.

4, *Buttler v. Warren*, 11 Johns. 57; *Burton v. Hinde*, 5 T. R. 173.

5, *Sylvester v. Downer*, 20 Vt. 355; 49 Am. Dec. 786.

6, *Citizens' Bank v. Steamboat Co.*, 2 Story (U. S.) 16; *Carlisle v. Eady*, 1 Car. & P. 234; *Goodhay v. Hendey*, 1 Moody & M. 319; *Southard v. Wilson*, 21 Me. 494; *Hall v. Steamboat Co.*, 13 Conn. 319; *Dunham v. Branch*, 5 Cush. 558; *Governor v. Daily*, 14 Ala. 469; *Dennett v. Lamson*, 30 Me. 223. But some of these cases lay down a strict rule as to the manner of proving a release.

7, *Lake v. Auburn*, 17 Wend. 18; *Brandigee v. Hale*, 13 Johns. 125; *Hall v. Baylies*, 15 Pick. 51.

8, *Dearborn v. Dearborn*, 10 N. H. 73; *Williams v. Mitchell*, 30 Ala. 299; *Mokelumne v. Woodbury*, 14 Cal. 265.

9, *Barnes v. Barker*, 6 Ill. 401; *Talmage v. Burlingame*, 9 Pa. St. 21; *Manchester Bank v. Moore*, 19 N. H. 564.

10, *Jenness v. Berry*, 17 N. H. 549; *Smith v. West*, 103 Ill. 332.

1745. Parties formerly incompetent witnesses.—It was a rule of the common law of wide application that parties to the suit were incompetent witnesses. *Nemo in propria causa testis esse debet.*¹ This rule was founded on the theory of the common law that persons interested in the result ought not to be subject to the temptation to commit perjury, and that their statements were entitled to but little credit. It was argued that it could "be no injury to truth to remove those from the jury whose testimony may hurt themselves, and can never induce any reasonable belief."² Since the disqualification *depended mainly on the ground of interest*, when this objection was removed, parties to the record might testify. Thus in actions *ex delicto*, where the action had terminated as to one defendant, he might be a witness for or against other defendants;³ and in actions on contract, where, by reason of a separate verdict or dismissal, the interest of a party was wholly terminated, his competency as a witness was restored.⁴ So where one was a mere nominal party having no pecuniary interest in the result and not being liable for costs, he was not disqualified.⁵ But if a party was liable for costs in case the litigation should result adversely, as in the case of a guardian *ad litem* or executor, this was sufficient to render him incompetent, although he might have no other interest in the controversy.⁶

- 1, 3 Bl. Comm. 371.
- 2, Gilb. Ev. 120; *Mobile Bank v. McDonnell*, 87 Ala. 736.
- 3, *Barnes v. Barber*, 6 Ill. 401; *Prettyman v. Dean*, 2 Har. (Del.) 494; *Campbell v. Hood*, 6 Mo. 211; *Brown v. Burrus*, 8 Mo. 26; *Over v. Blackstone*, 8 Watts & S. (Pa.) 71. The rule is otherwise in assumption, *Berry v. Stevens*, 71 Me. 503.
- 4, *Upton v. Adams*, 27 Ind. 432; *Blake v. Ladd*, 10 N. H. 190, by statute; *Essex Bank v. Rix*, 10 N. H. 201, by statute.
- 5, *Ryerss v. Trustees*, 33 Pa. St. 114; *Duffee v. Pennington*, 1 Ala. 506; *Coopwood v. Foster*, 20 Miss. 718; *Sawyer v. Mitchell*, 27 Mo. 510.
- 6, *Hopkins v. Neal*, 2 Strange 1026; *James v. Hatfield*, 1 Strange 548; *Rex v. St. Mary Magdalen*, 3 East 7; *Whitmore v. Wilks*, 3 Car. & P. 364.

§ 746. Exceptions to the ancient rule — Practice in equity.— Although the common law adhered tenaciously to the rule that parties could not be witnesses, there were a few exceptions which came to be recognized as necessary to prevent a failure of justice. For example, when it appeared from extraneous evidence that the defendant had embezzled or stolen, or otherwise fraudulently interfered with the goods of the plaintiff, or been guilty of a breach of trust in respect to such goods, the plaintiff was allowed to prove his loss by his own testimony, by showing the quantity and nature of the goods taken, when no other evidence of the fact could be obtained.¹ This exception was often applied to allow the

plaintiff to prove the contents of trunks or packages of which he was deprived by the fraudulent misconduct or crime of the defendant;² and in some cases, the same rule was applied where the loss was occasioned by the mere negligence of the defendant.³ On a similar ground of necessity, parties were allowed to prove by their own oath such facts of a preliminary character as the loss of documents,⁴ notice to produce papers⁵ and the death of subscribing witnesses,⁶ where no other person could testify to such facts. Such testimony was sometimes allowed in other cases, where no other testimony could be obtained, and where public necessity and expediency demanded the party's testimony as essential to the due administration of justice.⁷ Although it was the general rule *in chancery*, as at law, that parties were not competent witnesses, yet it was one of the advantages claimed for equity jurisdiction that it allowed much greater freedom in the examination of parties.⁸ Thus, "when an issue was directed from a court of chancery to be tried in a court of law, it was frequently made part of the order that the plaintiff or defendant should be examined as a witness;"⁹ and it is a familiar rule in equity procedure that the answer of the defendant, so far as it is strictly responsive to the bill, is received, not only as an admission of the defendant, but as evidence in his favor.¹⁰

1, *Childrens v. Saxby*, 1 Vern. 207; *Herman v. Drinkwater*, 1 Me. 27; *United States v. Clark*, 96 U. S. 41.

2, See cases just cited above.

3, *Clarke v. Spence*, 10 Watts (Pa.) 335.

4, *Tayloe v. Riggs*, 1 Peters 591; *Patterson v. Winn*, 5 Peters 233; *Riggs v. Tayloe*, 9 Wheat. 486; *DeLane v. Moore*, 14 How. 253; *Chamberlain v. Gorham*, 20 Johns. 144; *Page v. Page*, 15 Pick. 374; *Smiley v. Dewey*, 17 Ohio 156.

5, *Siltzell v. Michael*, 3 Watts & S. (Pa.) 329; *Jordan v. Cooper*, 3 Serg. & R. (Pa.) 564.

6, *Douglass v. Sanderson*, 2 Dall. (Pa.) 116; *Jackson v. Davis*, 5 Cow. 123; 15 Am. Dec. 451; *Moore v. Maxwell*, 18 Ark. 469.

7, *United States v. Murphy*, 16 Peters 203; *Lampley v. Scott*, 24 Miss. 528.

8, *Foote v. Silsby*, 3 Blatch. (U. S.) 507; *Webb v. Fitch*, 1 Root (Conn.) 177; *Lingan v. Henderson*, 1 Bland (Md.) 236.

9, Best Ev. sec. 172.

10, *Clark v. Van Riemsdyck*, 9 Cranch 153; Story Eq. juris. sec. 1528.

1747. Parties were not compelled to testify for the adversary—Rule in criminal cases.—At common law, although a party might consent to testify for his adversary, he was not compelled to do so; and, by the weight of authority, it was held that one of the several parties, plaintiff or defendant, could not testify for the adverse party, unless all the persons united in interest with him as plaintiffs or defendants gave their consent.¹ *In criminal cases*, the complaining witness or

prosecutor is not a party to the record, and therefore he was not excluded as a witness by the common law rule.³ The rule was the same, although by statute the prosecutor became entitled to a reward on the conviction of the prisoner. Since, even though in such cases the complaining witness might be deemed to have an interest in the result, the public interest required that his testimony should be received, and the statute giving the reward ought not be so construed as to close the door to conviction.⁴ Nor was it considered a valid objection that the prosecutor might be compelled to pay costs, if the courts should find the prosecution malicious;⁵ nor that he had given the prosecution pecuniary aid.⁶ Under the rules already stated, it is obvious that a defendant in a criminal case could not be a witness in his own behalf;⁷ nor could he be a witness on behalf of the state against any co-defendant in the same action, or a witness in behalf of such co-defendant, unless the prosecution had terminated against him in such a manner that he no longer could be deemed legally interested in the result, as by a judgment of conviction,⁸ verdict of acquittal⁹ or the entry of a *nolle prosequi*.¹⁰

1, Worrall v. Jones, 7 Bing. 395; Rex v. Woburn, 10 East 403; Com. v. Marsh, 10 Pick. 57; Mauran v. Lamb, 7 Cow. 174; Appleton v. Boyd, 7 Mass. 131.

2, Scott v. Lloyd, 12 Peters 149; Bridges v. Armour, 5

How. 91; *Frazier v. Laughlin*, 6 Ill. 347; *Evans v. Gibbs*, 6 Humph. (Tenn.) 405.

3, Best Ev. sec. 169; Greenl. Ev. sec. 362.

4, Gilb. Ev. 123; *United States v. Murphy*, 16 Peters 203; *Com. v. Moulton*, 9 Mass. 30.

5, *State v. Blennerhasset*, 1 Miss. 7; *Gilliam's Case*, 4 Leigh (Va.) 688.

6, *People v. Cunningham*, 1 Den. 524; 43 Am. Dec. 709.

7, *Welchell v. State*, 23 Ind. 89; *Harwell v. State*, 10 Lea (Tenn.) 544.

8, *Rex v. Fletcher*, 1 Strange 633; *R. v. Williams*, 8 Car. & P. 284; *State v. Jones*, 51 Me. 125; *Com. v. Smith*, 12 Met. 238; *Com. v. Eastman*, 1 Cush. 189; 48 Am. Dec. 596; *Henderson v. State*, 70 Ala. 23.

9, *R. v. Rowland*, *Ryan & M.* 401; *Fitzgerald v. State*, 14 Mo. 413.

10, *State v. Clump*, 16 Mo. 385. See also, *State v. West*, 69 Mo. 401; *Allen v. State*, 10 Ohio St. 287.

§ 748. **Effect of statutes on competency of parties as witnesses.**—But these common law rules excluding parties as witnesses have been abrogated in almost every state in the Union. Statutes have been passed by congress and by the state legislatures which make parties competent witnesses in all civil cases, except those in which transactions with insane, incompetent or deceased persons are involved.¹ The statutes of a few states do not even make this last exception, but provide that all parties to civil suits shall be competent as witnesses. Most of the states have also so extended the rule by statute that

the *accused in criminal prosecutions* is made a competent witness in his own behalf.² But in no case can the accused be compelled to be a witness against himself in a criminal prosecution, as he is guaranteed this exemption by the federal constitution.³ These statutes carefully guard the right of the accused to refuse to testify, if he chooses so to do, and many of them expressly provide that, in no case whatever, shall an unfavorable presumption against him be drawn from his failure to testify.⁴ These statutes do not affect the general rules of evidence governing the introduction of testimony, and simply place the party testifying in the *same situation in which other witnesses are placed*. In both civil and criminal cases, they are subject to the same liabilities, limitations and duties,⁵ have the same protection and are open to the same contradiction, impeachment⁶ and cross-examination⁷ as are any other witnesses. By statute in some of the states, however, the *cross-examination in criminal cases* is confined to the matters referred to in the direct examination; and it is held reversible error, under such a statute, to allow the defendant to be cross-examined as to any question not brought out in the direct examination.⁸ When the accused in a criminal prosecution voluntarily takes the stand as a witness, he waives his right to object to any question pertinent to the issue on the ground that the

answer may tend to criminate him. In the absence of statutes, limiting the cross-examination, he is subject to examination on all facts material to the issue, and he may be questioned as any general witness in the cause.⁹ He is not required to testify, and has the right to protect himself by not going upon the stand at all.¹⁰ But if he becomes a witness, all facts relevant to the case may then be drawn out, even if they tend to criminate the party or make him incompetent as a witness.¹¹ The refusal of a party testifying to answer a question material to the case, on the ground that it might criminate him, is competent evidence against the party testifying.¹² The opposing party waives all objection to the competency of a party to a civil suit as a witness by calling him, and makes him a competent witness in his own behalf.¹³

1, Alabama, Code 1886 sec. 2765; Arizona, Rev. Stat. 1887 sec. 1831; Arkansas, Dig. Stat. 1884 sec. 2857; California, Civil Code sec. 1879; Colorado, Gen. Stat. sec. 3647; Delaware, Laws vol. 16 ch. 537; Florida, Dig. Laws 1881 p. 518; Illinois, Rev. Stat. 1891 ch. 51 sec. 1; Indiana, Rev. Stat. 1888 sec. 496; Iowa, Rev. Code 1880 sec. 3638; Kansas, Gen. Stat. 1889 sec. 4414; Kentucky, Code 1888 sec. 605; Maine, Rev. Stat. 1883 p. 707 sec. 93; Maryland, Pub. Laws 1888 p. 685 sec. 1; Massachusetts, Pub. Stat. 1882 p. 987 sec. 18; Michigan, How. Ann. Stat. 1882 sec. 7544; Minnesota, Stat. (Kelly) 1891 sec. 5095; Mississippi, Code 1880 sec. 1599; Missouri, Rev. Stat. 1889 sec. 8918; Montana, Comp. Stat. Code Civ. Pro. 1887 sec. 647; Nevada, Gen. Stat. 1885 sec. 3399; New Hampshire, Gen. Laws 1878 p. 531 sec. 13; New Mexico, Comp. Laws 1884 sec. 2078;

New York, Code Civ. Proc. sec. 828; North Carolina, Code 1883 sec. 590; Ohio, Rev. Stat. 1890 sec. 5240; Oregon, Hill's Ann. Laws 1887 ch. 8 tit. 111 sec. 710; Pennsylvania, Laws 1887 ch. 89 as amended by laws 1891 number 218; Rhode Island, Pub. Stat. ch. 214 sec. 33; South Carolina, Code Civ. Proc. 1882 secs. 399, 400; Tennessee, Code 1884 sec. 4563; Texas, Rev. Stat. art. 2246; Utah, Comp. Laws 1888 vol. 2 tit. 10 ch. 2 sec. 3876; Vermont, Rev. Laws 1880 sec. 1001; Virginia, Code 1887 sec. 3345; Washington, Hill's Code vol. 2 sec. 1646; West Virginia, Code ch. 130 sec. 23; Wisconsin, Rev. Stat. 1889 secs. 4068, 4071.

2, Alabama, Crim. Code 1886 sec. 4473; Arkansas, Acts 1885 art. 82 sec. 1; California, Penal Code 1881 sec. 1323; Connecticut, Gen. Stat. 1888 sec. 1623; Illinois, Rev. Stat. 1883 ch. 38 sec. 426; Indiana, Rev. Stat. 1888 sec. 1798 cl. 4; Iowa, Code 1873 sec. 3636; Kansas, Gen. Stat. 1889 secs. 5280, 5281; Maine, Rev. Stat. 1883 ch. 82 sec. 94, ch. 134 sec. 19; Maryland, Pub. Gen. Laws art. 35 sec. 3; Massachusetts, Pub. Stat. 1882 ch. 169 sec. 18; Michigan, How. Ann. Stat. 1882 sec. 7544; Minnesota, Stat. (Kelly) 1891 sec. 5095; Mississippi, Laws 1882 ch. 78 sec. 1; Missouri, Rev. Stat. 1889 sec. 4218; Nebraska, Crim. Code sec. 473, Con. Stat. 1891 sec. 6101; New Hampshire, Pub. Stat. 1891 ch. 224 sec. 24; North Carolina, Code 1883 sec. 1353; Ohio, Rev. Stat. 1890 sec. 7286; Oregon, Ann. Laws 1887 sec. 1365; Pennsylvania, Laws 1887 no. 89 sec. 1; Rhode Island, Pub. Stat. 1882 ch. 214 sec. 39; South Carolina, Gen. Stat. 1882 sec. 2231; Texas, Code Crim. Proc. art. 730; Utah, Crim. Code 422, Comp. Laws 1888 sec. 5198; Vermont, Rev. Laws 1889 sec. 1655; Virginia, Code 1887 sec. 3897; West Virginia, Code 1891 ch. 152 sec. 19; Wisconsin, Rev. Stat. 1889 sec. 4071.

3, U. S. Const. 5th Amend. For full discussion of this provision as applied to accused persons summoned before the inter-state commerce commission, see *Counselman v. Hitchcock*, 142 U. S. 547; *Brown v. Walker*, 161 U. S. 591. For a discussion of the rule governing in proceedings against those held for contempt of court, see *In re Nickell*, 47 Kan. 734.

4, See statutes cited *supra*.

5, *Chambers v. People*, 105 Ill. 409; *McDaniels v. Robinson*, 26 Vt. 316; *People v. Russell*, 46 Cal. 121; *Cowles v. Bacon*, 21 Conn. 451. See also the cases cited below. These statutes do not remove the disqualification of husband and wife, *Mitchinson v. Cross*, 58 Ill. 366. A party may testify as an expert, *Dickinson v. Inhabitants*, 13 Gray 546.

6, *Chambers v. People*, 105 Ill. 409; *Reagan v. United States*, 157 U. S. 305; *Brandon v. People*, 42 N. Y. 265.

7, *Fralich v. People*, 65 Barb. (N. Y.) 48; *Brubaker's Adm. v. Taylor*, 76 Pa. St. 83; *State v. Horne*, 9 Kan. 119; *Spies v. People*, 122 Ill. 235; *Com. v. Mullen*, 97 Mass. 545; *Sullivan v. People*, 114 Ill. 24; *Rains v. State*, 88 Ala. 91; *Andrews v. Fry*, 104 Mass. 234; *State v. Ober*, 52 N. H. 459; *Connors v. People*, 50 N. Y. 240; *State v. Witham*, 72 Me. 531; *People v. Tice*, 131 N. Y. 651; *Com. v. Damon*, 136 Mass. 441; *Com. v. Morgan*, 107 Mass. 199; *Com. v. Nichols*, 114 Mass. 285; *State v. Wentworth*, 65 Me. 234; *Roddy v. Finnegan*, 43 Md. 490. See secs. 844, 845 *infra*.

8, *State v. Sanders*, 14 Ore. 300; *State v. Underwood*, 44 La. An. 852; *State v. Turner*, 110 Mo. 196; *State v. Chamberlain*, 89 Mo. 129; *People v. O'Brien*, 66 Cal. 602; *People v. Un Dong*, 106 Cal. 83; *Gale v. People*, 26 Mich. 157; *State v. Lurch*, 12 Ore. 99. The scope of the cross-examination is governed by state, and not by federal statutes, *Spies v. Illinois*, 123 U. S. 132, 180. See sec. 845 *infra*.

9, *Com. v. Mullen*, 97 Mass. 545; *Com. v. Morgan*, 107 Mass. 199; *Clark v. State*, 87 Ala. 71; *McGarry v. People*, 2 Lans. (N. Y.) 227. See cases cited in note 7 *supra*.

10, *Com. v. Lannan*, 13 Allen 563. It has been held that the court cannot require an accused, who is also a witness, to leave the room while other witnesses are testifying. Being a witness does not affect the right of the accused to be present during his own trial, *Garman v. State*, 66 Miss. 196; *Bell v. State*, 66 Miss. 192. The last case holds that the party cannot be compelled to testify before the other witnesses.

11, Such, for example, as want of religious belief, *State v. Turner*, 36 S. C. 534; previous arrest, *State v. Murphy*, 45 La. An. 938; *People v. Foote*, 93 Mich. 38; indictment

or conviction of crime, *State v. Minor*, 117 Mo. 302; *State v. McGuire*, 15 R. I. 23; *Williams v. State*, 28 Tex. App. 301; disorderly conduct, *People v. McCormick*, 135 N. Y. 663; previous contradictory statements, *Hicks v. State*, 99 Ala. 169; *Brubaker's Adm. v. Taylor*, 76 Pa. St. 83.

12, *Andrews v. Frye*, 104 Mass. 234.

13, *Seip v. Storch*, 52 Pa. St. 210; 91 Am. Dec. 148; *Turner v. McIlhaney*, 8 Cal. 575.

§ 749. *Same, continued.*—These statutes are enacted for the purpose of rendering competent, persons who would otherwise have been incompetent. They are *enabling, not disabling* acts; and the courts hold that all persons who were competent witnesses before the passage of any such statute are still competent, unless they are expressly disqualified by the statute itself.¹ The jury are the sole judges of the weight of the testimony of a party testifying as a witness in either a civil or a criminal case. But the judge may properly remind the jury, in his instructions to them, of the fact that the temptation is strong to color, pervert or withhold facts. Some authorities hold that it is the duty of the judge to so instruct the jury.² The jury, in arriving at their verdict, must weigh the evidence given by the party testifying as carefully as they do that of any other witness, for the court and not the jury are to *decide whether the evidence is competent*,³ but they may reject the testimony of any party as a whole, if they consider it unworthy of belief,⁴ or if

they find that he has corruptly testified falsely as to any material fact,⁵ or they may find a verdict against his uncontradicted evidence.⁶ The fact that a party has failed to rebut evidence that is detrimental to his case may be noticed as bearing upon the question of credibility, if the party is on the stand and does not give facts in rebuttal which lie within his knowledge.⁷ But the right of a party to testify is a *personal privilege*; and the fact that he does not testify at all should not raise a presumption against him, as various motives may influence him to take this action beside a fear that facts within his knowledge, if disclosed, would be unfavorable to him.⁸ If the attorneys make comment upon the fact that a party has not testified, it is the duty of the court to instruct the jury to disregard this failure of the accused to testify.⁹ It is also error for the judge, in his charge to the jury, to allude to the fact that the accused has not testified.¹⁰ The federal statutes on this subject, as well as those of some of the states, not only make parties to civil suits competent witnesses, but also give the opposing party power to compel them to testify.¹¹

1, Bates v. Forcht, 89 Mo. 121; Bradshaw v. Combs, 102 Ill. 428.

2, People v. Crowley, 102 N. Y. 234; Anderson v. State, 104 Ind. 367; State v. Moelchen, 53 Iowa 310; State v. Sterrett, 71 Iowa 386; Chambers v. People, 105 Ill. 409; state v. Renfrow, 111 Mo. 589; People v. Cronin, 34 Cal. 91; Wilkins v. State, 98 Ala. 1; State v. McGinnis, 76 Mo.

326; State v. Slingerland, 19 Nev. 135; Spies v. People, 122 Ill. 1; State v. McGuire, 113 Mo. 670; Faulkner v. Territory, (New Mexico 1893) 30 Pac. Rep. 905; Siebert v. People, 143 Ill. 571; Johnson v. United States, 157 U. S. 321; Reagan v. United States, 157 U. S. 301, a leading case with **an extended review of the authorities.** But the instructions must not assume that the other witnesses are "telling the truth," when they are in conflict with the evidence given by the party testifying, Hicks v. United States, 150 U. S. 442. There is no presumption either for or against the veracity of the party testifying. This question belongs exclusively to the jury, Com. v. Wright, 107 Mass. 403.

3, Wickliffe v. Lynch, 36 Ill. 209; Creed v. People, 81 Ill. 565; Hickory v. United States, 160 U. S. 408.

4, Lewis v. State, 88 Ala. 11; Roberts v. Gee, 15 Barb. (N. Y.) 449. See secs. 903 *et seq. infra*.

5, Hirschmann v. People, 101 Ill. 586. See sec. 905 *infra*.

6, Nicholson v. Connor, 8 Daly (N. Y.) 212.

7, Stover v. People, 56 N. Y. 315; Cotton v. State, 87 Ala. 103; State v. Walker, 98 Mo. 95; Lee v. State, 56 Ark. 42.

8, Lowe v. Massey, 62 Ill. 47; Moore v. Wright, 90 Ill. 470; Com. v. Hanley, 140 Mass. 457; Cotton v. State, 87 Ala. 103; Fulcher v. State, 28 Tex. App. 465; Staples v. State, 89 Tenn. 231; Quinn v. People, 123 Ill. 333; Watt v. People, 126 Ill. 9; State v. Tennyson, 42 Kan. 330. See also, People v. Jones, 24 Mich. 215; Ruloff v. People, 45 N. Y. 213; People v. Tyler, 36 Cal. 522; Com. v. Moran, 130 Mass. 281; Calkins v. State, 18 Ohio St. 366.

9, People v. Doyle, 58 Hun (N. Y.) 535; Staples v. State, 89 Tenn. 231; People v. Rose, 52 Hun (N. Y.) 33; Nelson v. Harrington, 72 Wis. 591; Austin v. People, 102 Ill. 261.

10, Com. v. Scott, 123 Mass. 239; 25 Am. Rep. 87; Long v. State, 56 Ind. 182; 26 Am. Rep. 19; Ruloff v. People, 45 N. Y. 231. But see, State v. Lawrence, 57 Me. 574. On this general subject, see note, 27 Am. Rep. 142.

11, Texas v. Chiles, 21 Wall. 488. See secs. 722 *et seq. supra*.

§750. Competency of parties—Corporators.—At common law, the question frequently arose whether the members of private and municipal corporations were competent witnesses under the rules excluding parties and those interested in the result. In the case of *municipal corporations*, although the actions were brought by or against the "inhabitants" of the municipality, the interest was generally deemed too remote to disqualify citizens as witnesses; and the objection reached to the credibility, and not to the competency of their testimony.¹ But if the inhabitants of the municipality had a special or personal interest in the event of the suit, as if their right to a way or a common was involved, a different rule obtained, and they were held incompetent.² In the case of *private corporations* for pecuniary gain, which included the most numerous class of corporations, other than municipalities, the actual members or shareholders were, as a rule, held incompetent witnesses on the ground of their direct interest in the result.³ Although the rule was so far relaxed that members of such corporations were allowed to testify as to formal or preliminary facts, not going to the merits of the controversy; for example, they might prove the service of notices in the cause, the identity and the correctness of corporate books and records and other similar facts.⁴ Members of

charitable, educational and religious corporations had not such pecuniary interest as to be disqualified as witnesses. Hence, the members and officers of churches, school districts, private educational institutions and the like were competent to testify at common law.^b It is hardly necessary to add that the statutes which allow parties and persons interested in the result to testify have wholly changed the former rules on this subject.^c

1, *Smith v. Barber*, 1 Root (Conn.) 207; *Methodist Church v. Wood*, Wright (Ohio) 12; *Ezell v. Giles County*, 3 Head (Tenn.) 583; *Kemper v. Victoria*, 3 Tex. 135; *City Council v. King*, 4 McCord (S. C.) 269; *Bloodgood v. Overseers*, 12 Johns. 285.

2, *Moore v. Griffin*, 22 Me. 350; *Gould v. James*, 6 Cow. 369; *Odiorne v. Wade*, 8 Pick. 518. Nor could they make themselves competent by a release, *Jacobson v. Fountain*, 2 Johns. 170.

3, *Consolidated Ice Co. v. Keifer*, 134 Ill. 481, 495; 23 Am. St. Rep. 688; *Doe v. Tooth*, 3 Young & J. 19; *Davies v. Morgan*, 1 Tyrw. 457; *Montgomery v. Webb*, 27 Ala. 618; *Jefferson v. Stewart*, 4 Har. (Del.) 82; *Southern Co. v. Coie*, 4 Fla. 359; *Pierce v. Kearney*, 5 Hill 82; *Hill v. Frazier*, 22 Pa. St. 320; *Kemper v. Victoria*, 3 Tex. 135. A stockholder cannot make himself competent by selling his shares after the commencement of the action, *Mokelumne Co. v. Woodbury*, 14 Cal. 265. But see, *Thrasher v. Pike Ry. Co.*, 25 Ill. 393.

4, *York Ry. Co. v. Bratt*, 40 Me. 447; *Union Canal Co. v. Loyd*, 4 Watts & S. (Pa.) 393; *Fell v. McHenry*, 42 Pa. St. 41.

5, *Nason v. Thatcher*, 7 Mass. 398; *Shortz v. Unangst*, 5 Watts & S. (Pa.) 45; *Hill v. School District*, 17 Me. 316; *Allen v. Westport*, 15 Pick. 35; *Hersby v. Clarksville Institute*, 15 Ark. 128; *Matter of Kip*, 1 Paige (N. Y.) 601;

Cooper v. Sisters of Providence, 16 Ind. 164. But see, Stone v. Birkshire Society, 14 Vt. 86.

6, See statutes of the jurisdiction.

§751. Husband and wife incompetent as witnesses.—It was a favorite doctrine of the common law that husband and wife were one person in the law. Since parties were incompetent to testify in their own behalf, it followed that, if the legal identity of husband and wife was conceded, they were not competent witnesses for or against each other. Blackstone thus stated this ground of exclusion: "But in trials of any sort, they are not allowed to be evidence for or against each other, partly because it is impossible their testimony should be indifferent, but principally because of the union of person; and, therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of the law '*nemo in propria causa testis esse debet*'; and if against each other, they would contradict another maxim '*nemo tenetur seipsum accusare*.'" ¹ But there is another reason for the exclusion of testimony of this kind which has outlived the more technical grounds already mentioned. *Public policy* demands that those living in the marriage relation should not be compelled or allowed to betray the mutual trust and confidence which such a relation implies. "This rule was not limited to protecting from disclosure

matters communicated in nuptial confidence, or facts, the knowledge of which had been acquired in consequence of the relation of husband and wife, but was an *absolute prohibition* of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired."¹ Although, in most jurisdictions, statutes have been enacted modifying, to some extent, the common law rules on this subject, yet there is such lack of uniformity in those statutes that it is necessary to further illustrate the scope and meaning of the ancient rule.

1, 1 Bl. Comm. 443. See notes, 24 Am. St. Rep. 663; 27 Am. Dec. 377, as to the subject of this and succeeding sections; also articles, 1 Alb. L. Jour. 245; 25 Am. L. Reg. 353, 417; 21 Irish L. Times & Rep. 173; 24 Am. L. Rev. 779, where this subject is discussed.

2, Best Ev. sec. 175.

§ 752. Same—Illustrations of the common law rule.—Subject to the exceptions and qualifications to be hereafter noticed, when either spouse was a party to the record, the other could not be a witness.¹ Thus, the husband could not witness a deed of land to the wife, executed during marriage,² or testify in support of a nuncupative will in her favor,³ or for the contestant of a will, where the wife could be benefited,⁴ or in behalf of her interest in her separate estate,⁵ or in an action brought by an administrator or trustee

to increase an estate in which the wife had an interest,⁶ or to prove a marriage contract in her behalf,⁷ or to prove their marriage, where she sued as a *feme sole*,⁸ or in an action against her, where coverture was pleaded.⁹ The wife could not be a witness where her testimony sustained her husband's property rights to land¹⁰ or personal property,¹¹ or in actions against him for trespass to the person.¹² It illustrates the rigor of the old rule that the husband or wife could not be a witness where the other spouse was not a nominal party to the action, if he or she was the real party in interest.¹³ *Where the interests of either husband or wife, though not a party, were directly involved* in an action and would be concluded by a verdict, the other spouse could not testify.¹⁴ On principles of public policy and decency, it was the common law rule, and still is the law, that neither husband nor wife is competent to prove *non-access* during wedlock, whatever the form of legal proceedings.¹⁵

1, *Weikel v. Probasco*, 7 Ind. 690; *Tacket v. May*, 3 Dana (Ky.) 79; *Breed v. Gove*, 41 N. H. 452; *Seargent v. Seward*, 31 Vt. 509; *Warner v. Press Pub. Co.*, 132 N. Y. 181; *Bird v. Davis*, 14 N. J. Eq. 467; *Cull v. Herwig*, 18 La. An. 315; *Stewart v. Stewart*, 7 Johns. Ch. (N. Y.) 229; *Bihin v. Bihin*, 17 Abb. Pr. (N. Y.) 19; *Bird v. Hueston*, 10 Ohio St. 418; *Com. v. Cleary*, 152 Mass. 491. See note, 24 Am. St. Rep. 663. A wife can not testify against her husband, even where it appears that they married for the express purpose of suppressing the testimony, *United States v. White*, 4 Utah 499.

- 2, Johnson v. Slater, 11 Gratt. (Va.) 321.
- 3, Jones v. Norton, 10 Tex. 120.
- 4, Walker v. Walker, 34 Ala. 469.
- 5, Miller v. Williamson, 5 Md. 219; Wilson v. Sheppard, 28 Ala. 623; Dwelly v. Dwelly, 46 Me. 377; Williamson v. Morton, 2 Md. Ch. 94; Marshman v. Conklin, 17 N. J. Eq. 282; Warner v. Dyett, 2 Edw. Ch. (N. Y.) 497.
- 6, Lisman v. Early, 12 Cal. 282; Radford v. Fowlkes, 85 Va. 820.
- 7, McDuffie v. Greenway, 24 Tex. 625.
- 8, Bentley v. Cook, 3 Doug. 422.
- 9, Woodgate v. Potts, 2 Car. & K. 457.
- 10, Gardner v. Klutts, 8 Jones (N. C.) 375; Scott v. Rowland, 82 Va. 484.
- 11, Hayes v. Parmalee, 79 Ill. 563.
- 12, Farrell v. Ledwell, 21 Wis. 182.
- 13, Pyle v. Maulding, 7 J. J. Marsh. (Ky.) 202; Cobb v. Edmondson, 30 Ga. 30; Pleasonton v. Nutt, 115 Pa. St. 266.
- 14, Griffin v. Brown, 2 Pick. 303; Young v. Gilman, 46 N. H. 484; Larrabee v. Wood, 54 Vt. 452; Craig v. Miller, 34 Ill. App. 385; 133 Ill. 300.
- 15, Chamberlin v. People, 23 N. Y. 85; Rex v. Book, 1 Wils. 340; Reg. v. Luffe, 8 East 193; Rex v. Mansfield, 1 Q. B. 444; Boykin v. Boykin, 70 N. C. 262; People v. Court of Sessions, 45 Hun (N. Y.) 54. But from the necessity of the case, in actions for bastardy, the wife may testify to the criminal intercourse, Ratcliff v. Wales, 1 Hill 66 and cases cited. See sec. 96 *supra*.

§ 753. Same—The rule in criminal cases.—The illustrations already given have mostly related to civil actions, but the same principles govern in criminal cases. In any criminal prosecution, neither spouse is a

competent witness for or against the other.¹ A well recognized exception to this rule, arising from necessity, exists in prosecutions for *personal injury* committed by *one spouse upon the other*. Thus, in actions for assault or other violence, the injured party may testify for or against the wrong-doer, though a husband or wife;² and in cases of such personal injury, the injured person may be compelled to testify.³ The exception, however, does not extend to all offenses which may constitute a wrong to the husband or wife, such as, adultery⁴ or conspiring to charge adultery,⁵ subornation of perjury⁶ and incest.⁷ On the same principle, where a husband or wife is on trial for an assault or other personal injury to the other spouse, the other may be a witness for the defendant.⁸ Since the principle of the general common law rule applied in all cases where the interests of the other party were involved, the spouse of *one indicted* and on trial *jointly with others* is not a competent witness for any of the defendants.⁹ It has been so held even in cases where the husband or wife, so indicted, was not brought to trial,¹⁰ or had a separate trial.¹¹ But, by the weight of authority, where the grounds of defense are several and distinct, and in no manner dependent on each other, it is held that the wife of one defendant may be admitted as witness for another,¹² as well as where he has failed to

appear and his recognizance has been forfeited,¹³ and where the prosecution has been dismissed as to him.¹⁴ In *prosecutions for bigamy*, the second wife may testify in those cases where the first marriage has not been disputed or has been duly established by other evidence, since it then appears that she is not the real wife; but she cannot testify as to the first marriage.¹⁵ It has been held in Canada that, on an indictment for bigamy, the testimony of the first wife is inadmissible for the defense to prove that her marriage is invalid,¹⁶ but this rule is criticised by Mr. Wharton.¹⁷ He concludes, however, that, in such case, she cannot be called upon to sustain the marriage, "for she is excluded by the very hypothesis she is called to support."¹⁸ The privilege under discussion is not a personal privilege of the witness, but the other spouse, if a party, may object.¹⁹

1, *Wilke v. People*, 53 N. Y. 525; *Lucas v. State*, 23 Conn. 18; *Hussey v. State*, 87 Ala. 121; *People v. Gordon*, 100 Mich. 518; *State v. Willis*, 119 Mo. 485; *Owen v. State*, 89 Tenn. 698. On this subject, see note, 35 Cent. L. Jour. 435.

2, *People v. Fitzpatrick*, 5 Park. Cr. (N. Y.) 26; *People v. Carpenter*, 9 Barb. (N. Y.) 580; *Johnson v. State*, 27 Tex. App. 135; *Lord Audley's Trial*, 3 How. St. Tr. 402; *State v. Neill*, 6 Ala. 685; *Com. v. Murphy*, 4 Allen 491; *People v. Selring*, 66 Mich. 705; 45 Am. Rep. 412; *Whipp v. State*, 34 Ohio St. 87; *State v. Davidson*, 77 N. C. 522; *State v. Davis*, 3 Brev. (S. C.) 3. The rule is the same in cases of attempt to poison, *People v. Northrop*, 50 Barb. (N. Y.) 147; *Com. v. Sapp*, 90 Ky. 580; 29 Am. St. Rep. 105; abortion by violence, *State v. Dyer*, 59 Mo. 303; *Navarro v.*

State, 24 Tex. App. 378; abandonment, State v. Brown, 67 N. C. 470. See note, 27 Am. Dec. 377.

3, Bromlette v. State, 21 Tex. App. 611; Johnson v. State, 94 Ala. 53; Thiede v. Utah, 159 U. S. 510.

4, Com. v. Jailer, 1 Grant Cas. (Pa.) 218; Bassett v. United States, 137 U. S. 496; Cotton v. State, 62 Ala. 121; State v. Jones, 89 N. C. 559; Com. v. Gordon, 2 Brewst. (Pa.) 369; People v. Swanston, 93 Mich. 254; McLean v. State, 32 Tex. Cr. Rep. 521; State v. Welch, 26 Me. 30; 45 Am. Dec. 94; Com. v. Sparks, 7 Allen 534; State v. Gardner, 1 Root (Conn.) 485; People v. Hendrickson, 53 Mich. 525; Compton v. State, 13 Tex. App. 271, overruling earlier decisions. Contra, State v. Chambers, 87 Iowa 1, and Iowa cases there cited; State v. Volander, 57 Minn. 225; State v. Dudley, 7 Wis. 664; Lord v. State, 17 Neb. 526. Most of the cases holding this latter rule depend on statutes, however.

5, State v. Burlingham, 15 Me. 104.

6, People v. Carpenter, 9 Barb. (N. Y.) 580.

7, People v. Westbrook, 94 Mich. 629; Compton v. State, 13 Tex. App. 271; 44 Am. Rep. 703. Contra, State v. Chambers, 87 Iowa 1.

8, Rex v. Sergeant, Ryan & M. 354; State v. Neill, 6 Ala. 685; Com. v. Murphy, 4 Allen 491; People v. Fitzpatrick, 5 Park. Cr. (N. Y.) 26; State v. Parker, 42 La. An. 972; Johnson v. State, 27 Tex. App. 135.

9, Com. v. Eastland, 1 Mass. 15; Com. v. Robinson, 1 Gray 555; Mask v. State, 32 Miss. 405; State v. Jolly, 3 Dev. & B. (N. C.) 110; 32 Am. Dec. 656; State v. Welch, 26 Me. 30; 45 Am. Dec. 94, where the wife was not jointly indicted. See also, Morrissey v. People, 11 Mich. 327, by statute.

10, State v. Bradley, 9 Rich. L. (S. C.) 168.

11, Pullen v. People, 1 Doug. (Mich.) 48; United States v. Wade, 2 Cranch C. C. 680; State v. Smith, 2 Ired. (N. C.) 402. Contra, Cornelius v. Com., 3 Met. (Ky.) 481; State v. Burnside, 37 Mo. 343; Com. v. Manson, 2 Ashm. (Pa.) 31; State v. Drawdy, 14 Rich. L. (S. C.) 87; Workman v. State, 4 Sneed (Tenn.) 425; People v. Langtree, 64 Cal. 256.

12, *State v. Waterman*, 1 Nev. 543; *Moffit v. State*, 2 Humph. (Tenn.) 99; *State v. Anthony*, 1 McCord (S. C.) 285. But see, *State v. Wright*, 41 La. An. 600; *Adams v. State*, 28 Fla. 511, wife called by the state.

13, *State v. Worthing*, 31 Me. 62.

14, *Ray v. Com.*, 12 Bush (Ky.) 397.

15, *Miles v. United States*, 103 U. S. 304; *Finney v. State*, 3 Head (Tenn.) 544. Nor can the first wife be admitted to prove the second marriage bigamous by confession made to her by her husband, *Bassett v. United States*, 137 U. S. 496. As to this subject, see long note, 47 Am. St. Rep. 228-232.

16, *R. v. Madden*, 14 Up. Can. Q. B. 588.

17, 1 Whart. Ev. sec. 426.

18, 1 Whart. Ev. sec. 426; *Miles v. United States*, 103 U. S. 304; *State v. Ulrich*, 110 Mo. 350; *Salter v. State*, 92 Ala. 68; *Boyd v. State*, 33 Tex. Cr. Rep. 470.

19, *People v. Wood*, 126 N. Y. 249.

§ 754. Same — Confidential communications.—Said Lord Ellenborough: "It is a sound doctrine that trust and confidence between man and wife shall not be betrayed." ¹ Although the statutes repealing the rule that interested witnesses were incompetent, as well as other similar statutes, have in various jurisdictions somewhat enlarged the capacity of husband and wife as witnesses, this principle is still generally recognized, and excludes the testimony of either husband or wife as to *communications between each other during marriage.* ² Thus, the courts have excluded, on this ground, *conversations*

between husband and wife relative to the making of a will,³ as to pedigree,⁴ the purchase of goods⁵ or as to memoranda furnished for the keeping of accounts,⁶ or as to the circumstances of an accident in a personal injury case.⁷ In the same manner, the fact that conversations or communications were not held between them is privileged.⁸ It is held, where statutes exclude private communications between husband and wife, that conversations *in the hearing of third persons* may be testified to by the husband or wife,⁹ and "there is no rule of law requiring that third persons, who hear a private conversation between husband and wife, shall be restrained from introducing it in their testimony."¹⁰ In *suits between third parties*, husband or wife may testify to transactions between themselves, which involve no breach of matrimonial confidence.¹¹ In some states, the privilege is confined by statute to *confidential communications*; and in such cases, it has been held that the statute does not apply to all communications made between husband and wife, when alone, but to such as are expressly made confidential, or are of a confidential nature or induced by the marital relation, and not to ordinary conversations relating to matters of business of such a nature as not to be deemed confidential.¹² But where the statute excluded "private conversations," it was held that this includes

conversations on subjects which are not confidential in their nature.¹³

1, *Averson v. Kinnaird*, 6 East 192. See article, 24 Am. L. Rev. 779; also extended note, 29 Am. St. Rep. 411-423.

2, *Leffler v. Minnesota Tribune Co.*, 35 Minn. 310; *Westerman v. Westerman*, 25 Ohio St. 500; *White v. Perry*, 14 W. Va. 66; *Miller v. Miller*, 14 Mo. App. 418; *French v. Wade*, 35 Kan. 391; *Com. v. Cleary*, 152 Mass. 491; *Dye v. Davis*, 65 Ind. 474; *Keaton v. Dimmick*, 46 Barb. (N. Y.) 158; *O'Connor v. Mayoribanks*, 4 Man. & G. 435; *Raynes v. Bennett*, 114 Mass. 424; *Warner v. Press Pub. Co.*, 132 N. Y. 181; *Selden v. State*, 74 Wis. 271; 17 Am. St. Rep. 144 and cases cited.

3, *Baldwin v. Parker*, 99 Mass. 79.

4, *Brooks v. Francis*, 3 MacArth. (D. C.) 109.

5, *Raynes v. Bennett*, 114 Mass. 424.

6, *Easterbrooks v. Prentiss*, 34 Vt. 457. As to papers entrusted by one to the other, *Stanford v. Murphy*, 63 Ga. 410.

7, *Newstrom v. St. Paul & D. Ry. Co.*, (Minn.) 63 N. W. Rep. 253.

8, *Goodrun v. State*, 60 Ga. 509.

9, *Fay v. Guynon*, 131 Mass. 31; *McCague v. Miller*, 36 Ohio St. 595; *Com. v. Griffin*, 110 Mass. 181; *State v. Center*, 35 Vt. 378; *State v. Gray*, 55 Kan. 135; *Allison v. Barrow*, 3 Coldw. (Tenn.) 414; *Troy Fertilizer Co. v. Logan*, 90 Ala. 325; *Mercer v. Patterson*, 41 Ind. 440. *Contra*, *Campbell v. Chace*, 12 R. I. 333; *Low's Estate*, Myr. Prob. (Cal.) 143; *Holman v. Bachus*, 73 Mo. 49; *Bird v. Hueston*, 10 Ohio St. 418; *In re Buckman's Will*, 64 Vt. 313. But communications made by husband and wife in the presence of children merely are privileged, *Jacobs v. Hesler*, 113 Mass. 157; but in the later case of *Lyon v. Prouty*, 154 Mass. 488, communications in the presence of a fourteen year old daughter were not held privileged.

10, *Com. v. Griffin*, 110 Mass. 181; *State v. Carter*, 35 Vt. 378; *Gannou v. People*, 127 Ill. 507.

11, Nolen v. Harden, 43 Ark. 307.

12, Parkhurst v. Berdell, 110 N. Y. 386.

13, Dexter v. Booth, 2 Allen 559.

1755. Duration of the disability.—

Since the general rule under discussion depends, not only upon the interest of the parties, but on grounds of public policy, the disability to testify does not cease with the termination of the marriage relation. In the absence of statutory regulation, it is well settled that, after the dissolution of the marriage by *death or divorce*, neither the husband nor wife can testify as to any communications held between them by reason of the confidence of the marriage relation.¹ It is the policy of the law that neither husband nor wife need have any reason to fear that the confidence which belongs to the most sacred relation of life shall ever be betrayed in courts of justice.² Thus, after the dissolution of the marriage, one of the parties thereto has been held incompetent to testify to communications relative to a post-nuptial settlement,³ or as to the purchase of goods,⁴ or as to an alleged confession of false swearing in a former case,⁵ or as to threats alleged to have been made,⁶ or as to conveyances,⁷ or as to conversations or confidential acts.⁸ Letters between husband and wife are governed by the same rule, and are treated as confidential communications.⁹ So where a husband contests his wife's

will, he cannot testify as to their confidential communications.¹⁰ The communications may consist of acts as well as words.¹¹ But this privilege cannot be claimed during the continuance of the marital relation or afterwards, as a cloak to cover *fraud* and shield the wrong-doer, a third person, who is benefited by the fraudulent acts in question.¹² Mr. Bishop thus sums up the general rule on this subject: "All facts which came to the knowledge of either party, whereof the disclosure would violate the confidence of the matrimonial relation, especially if prejudicial to the other party, are kept perpetually under the protection of the rule of public policy which, to promote freedom and harmony in matrimonial intercourse, forbids their disclosure in evidence."¹³

1, Brock v. Brock, 116 Pa. St. 109; Stanley v. Montgomery, 102 Ind. 102.

2, Dickerman v. Graves, 6 Cush. 308; Babcock v. Booth, 2 Hill 181; 38 Am. Dec. 578.

3, Williams & Mary College v. Powell, 12 Gratt. (Va.) 372.

4, Dexter v. Booth, 2 Allen 559.

5, Stein v. Bowman, 13 Peters 209.

6, Anderson v. Anderson, 9 Kan. 112.

7, Babcock v. Booth, 2 Hill 181; 38 Am. Dec. 578; Blanchard v. Moors, 85 Mich. 380.

8, Brock v. Brock, 116 Pa. St. 109; Perry v. Randall, 83 Ind. 143.

9, Selden v. State, 74 Wis. 271; Scott v. Com., 94 Ky. 311; Bowman v. Patrick, 32 Fed. Rep. 368; Mitchell v.

Mitchell, 80 Tex. 101; State v. Ulrich, 110 Mo. 350. But the privilege is waived when the letters are given to a third party, People v. Hayes, 140 N. Y. 484; and when they come to the hands of a third party, the court does not inquire by what right such party is possessed of them, State v. Mathers, 64 Vt. 101. This rule applies only to the legal wife, Com. v. Caponi, 155 Mass. 534, this case holds that, under the Massachusetts statutes, letters are not included under private communications.

10, Maynard v. Vinton, 59 Mich. 139; 60 Am. Rep. 276.

11, Perry v. Randall, 83 Ind. 143.

12, Henry v. Sneed, 99 Mo. 407; 17 Am. St. Rep. 580.

13, 2 Bish. Mar., Div. & Sep. sec. 1663; Hitchcock v. Moore, 70 Mich. 112; 14 Am. St. Rep. 474 and note; Norris v. Stewart's Heirs, 105 N. C. 455; 18 Am. St. Rep. 917; French v. Ware, 65 Vt. 338.

1756. Matters which may be disclosed after the marriage relation ceases.—After the close of the marriage relation, either party may testify to matters which took place during the marriage, unless such testimony involves the disclosure of matters of confidence.¹ As illustrations of this rule, such testimony may be given relative to the acts, the transactions² or conversations of the other spouse with third persons,³ provided such knowledge is not derived by means of confidential communications between husband and wife. In a celebrated case, it was held that a divorced wife might testify that she saw no indications of insanity exhibited by her husband during their association.⁴ It has also been held that

the privilege does not extend to those communications which, in their nature, are not private or confidential, but which, from the nature of the case, must have been intended to have been made public.⁵ Nor does the rule apply to such facts as came to the knowledge of the witness during the marriage by means equally accessible to other persons, and not disclosed in conversations with the other spouse,⁶ or to matters that came to the knowledge of the spouse before the marriage or after the separation.⁷ In some cases, it has been held that one spouse could not testify to transactions affecting the character of the other.⁸

1, *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198; *Haugh v. Blythe*, 20 Ind. 24; *Elswick v. Com.*, 13 Bush (Ky.) 155; *Ryan v. Follansbee*, 47 N. H. 100; *Cornell v. Vanartsdalen*, 4 Pa. St. 364; *Powell v. Powell*, 114 Ill. 329; *Spaulding v. Albin*, 63 Vt. 148; *French v. Ware*, 65 Vt. 338.

2, *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Stober v. McCarter*, 4 Ohio St. 513; *White v. Perry*, 14 W. Va. 66; *Spivey v. Platon*, 29 Ark. 603; *Powell v. Powell*, 114 Ill. 329; *Short v. Tinsley*, 1 Met. (Ky.) 397; *Stein v. Weidman*, 20 Mo. 17; *Gaskill v. King*, 12 Ired. (N. C.) 211; *Robbs' Appeal*, 98 Pa. St. 501; *Litchfield v. Merritt*, 102 Mass. 520, payment of a note; *Robinson v. Talmadge*, 97 Mass. 171, where a wife testified as to the habit of her husband in carrying notes.

3, *Pratt v. Delavan*, 17 Iowa 307; *Stuhlmuller v. Ewing*, 39 Miss. 447; *Griffin v. Smith*, 45 Ind. 366; *Floyd v. Miller*, 61 Ind. 224; *French v. Ware*, 65 Vt. 338; *French v. Follett*, 65 Vt. 338.

4, *United States v. Guiteau*, 1 Mackey (D. C.) 498.

5, *Crook v. Henry*, 25 Wis. 569; *McGuire v. Maloney*, 1

B. Mon. (Ky.) 224, *Stober v. McCarter*, 4 Ohio St. 513; *Parkhurst v. Berdell*, 110 N. Y. 386.

6, *Bigelow v. Sickles*, 75 Wis. 427; *Stanley v. Stanley*, 112 Ind. 143, as to the intoxication of the husband.

7, *Stillwell v. Patton*, 108 Mo. 352; *Long v. State*, 86 Ala. 36.

8, *Smith v. Potter*, 27 Vt. 304; 65 Am. Dec. 198; *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Stein v. Bowman*, 13 Peters 209.

§ 757. **Same—Actions for criminal conversation—May the objection be waived.**—It has been held that, in an action for criminal conversation by the husband after divorce, the divorced wife may testify for her husband against her paramour. In such decisions, it is urged that the witness by testifying betrays no trust reposed in her during coverture, and that the fact called for did not come to her knowledge in consequence of the marriage relation.¹ Clearly the wife is not a competent witness for the husband, in such cases, during the marriage relation. In some jurisdictions by statute, she may be a witness for the defendant, except as to communications between the husband and wife.² In several cases in actions for *criminal conversation*, the husband, being plaintiff, has been allowed to testify, although the issue related to the criminality of his wife as well as that of defendant, and this is the rule supported by the weight of authority.³ Since the common law rule prohibiting the testimony of husband or wife for or against each other de-

pended, not only on the ground of interest, but of public policy as well, it did not render them competent witnesses, if a *release* was executed of all the interest in the subject matter of the suit.⁴ A conflict of opinion has arisen as to whether, in the absence of statutes, the *consent* of the husband or wife *that the other spouse may testify* as an adverse witness changes the general rule. On the one hand, it is urged that, since the disqualification rests on grounds of public policy, such consent does not remove the obligation; and this would seem to be the better conclusion.⁵ Other authorities, however, hold that the objection may be waived in this manner.⁶

1, Dickerman v. Graves, 6 Cush. 308; 53 Am. Dec. 1 and note; Ratcliff v. Wales, 1 Hill 63; Chamberlin v. People, 23 N. Y. 85; 80 Am. Dec. 255; Wottrich v. Freeman, 71 N. Y. 601. Contra, Rea v. Tucker, 51 Ill. 110; Cross v. Rutledge, 81 Ill. 266. See article, 35 Cent. L. Jour. 423, in cases of bigamy.

2, Reynolds v. Schaffer, 91 Mich. 494; 30 Am. St. Rep. 492; Carpenter v. White, 46 Barb. (N. Y.) 292; Rev. Stat. Wis. sec. 4072; New York, Code Civ. Prac. sec. 831; Smith v. Merrill, 75 Wis. 461, as to letters.

3, Smith v. O'Brien, 6 N. Y. S. 174; Burnell v. Greathead, 49 Barb. (N. Y.) 106; Woods v. Gledhill, 9 N. Y. S. 266; Lyon v. Prouty, 154 Mass. 488. Contra, Cornelius v. Hambay, 150 Pa. St. 359.

4, Meredith v. Hughes, 28 Ga. 571; Weems v. Weems, 19 Md. 334. Contra, Locke v. Noland, 11 Ala. 249.

5, Stein v. Bowman, 13 Peters 209; Sedgwick v. Watkins, 1 Ves. Jr. 49; Davis v. Dinwoody, 4 T. R. 678.

6, Pedley v. Wollesley, 3 Car. & P. 558; Parkhurst v. Berdell, 110 N. Y. 386; 6 Am. St. Rep. 384, waived by failure to object to wife's testimony.

§ 758. **Exceptions—Agency.**—We have already seen that the general common law rule was not absolute in all cases; it yielded to the exigencies of particular cases; and exceptions were recognized when the purposes of justice required it. We will now consider some of the exceptions or qualifications of the rule.¹ Among the well recognized exceptions to the general rule is that, when a husband or wife is the *agent of the other spouse*, such agent may be a witness as to all business transacted within the scope of such agency. In England, the rule was established at an early day that where a wife acted as the agent of her husband in any business, the husband was bound by her admissions and declarations made in the course of such business.² In this country, the rule prevails, not only that the *ex parte* declarations of the agent may be received in such cases, but that the agent may testify as to all business transacted within the scope of the agency.³ Thus, where the husband leaves home and gives instructions to the wife to manage things as he would, if at home, she may testify as to the transaction of business occurring in his absence.⁴ So the testimony of husband or wife has been received, in respect to acts of agency for the other spouse, to prove the accuracy of accounts,⁵ attempts to collect debts,⁶ proofs of loss under an insurance policy,⁷ contracts made in the course

of the agency⁸ and the misconduct of the husband in sending the wife away from home, in an action by a third party for necessities furnished the wife.⁹ The wife may be a witness where she acts as agent both for her husband and for a third person with whom a contract is made.¹⁰ Communications between a husband and wife, relating to an agency conferred by one upon the other, are not confidential, and are admissible.¹¹

1, See sec. 756 *supra*.

2, *Emerson v. Blondin*, 1 Esp. 142; *Clifford v. Burton*, 1 Bing. 199; 8 E.C.L. 471; *Anderson v. Sanderson*, 1 Holt 591; 3 E.C.L. 232; *Curtis v. Ingham*, 2 Vt. 287; *Hughes v. Stokes*, 1 Hayw. (N. C.) 372; *Riley v. Suydam*, 4 Barb. (N. Y.) 222; *Pickering v. Pickering*, 6 N. H. 120; 1 Phill. Ev. 77.

3, *Birdsall v. Dunn*, 16 Wis. 235; *Chunot v. Larson*, 43 Wis. 536; *Robertson v. Brost*, 83 Ill. 116; *Council Grove Ry. Co. v. Center*, 42 Kan. 438; *Burke v. Savage*, 13 Allen 408, by statute; *Schmied v. Frank*, 86 Ind. 250; *Chesley v. Chesley*, 54 Mo. 347; *Lunay v. Vantyne*, 40 Vt. 501.

4, *Chunot v. Larson*, 43 Wis. 536, trespass; *Sergeant v. Marshall*, 38 Ill. App. 642.

5, *Littlefield v. Rice*, 10 Met. 287; *Pierce v. Bradford*, 64 Vt. 219.

6, *Engmann v. Immel*, 59 Wis. 249.

7, *O'Connor v. Hartford Ins. Co.*, 31 Wis. 161.

8, *Sumner v. Cooke*, 51 Ala. 521; *Birdsall v. Dunn*, 16 Wis. 235.

9, *Bach v. Parmely*, 35 Wis. 238.

10, *Martin v. Hurlburt Sav. Bank*, 60 Vt. 364; *Birdsall v. Dunn*, 16 Wis. 235.

11, *Schmied v. Frank*, 86 Ind. 250; *Com. v. Hayes*, 145 Mass. 289; *Council Grove Ry. Co. v. Center*, 42 Kan. 438; *Dyer v. State*, 88 Ala. 225.

§ 759. **Proof of the agency.**—Of course, in all such cases of agency of the husband or wife, there must be proof of the agency.¹ But such agency is more readily inferred than in the case of strangers; and, in the case of the absence of the husband, the wife is presumed to have the power to do such acts relating to the family and the home as wives usually do under similar circumstances.² But she is not presumed to have the power to sell his property, except in the regular course of business,³ nor to give authority to commit trespass,⁴ nor to do other acts outside the customary business.⁵ Agency is not to be presumed from the fact that the wife bears a message for the husband,⁶ or that she is present with him when business is transacted.⁷ The husband or wife *may testify*, not only to the acts performed as agent, but *to the fact of the agency itself*.⁸

1, Orcutt v. Cook, 37 Vt. 515; Meek v. Pierce, 19 Wis. 300; Wagonseller v. Rexford, 2 Ill. App. 455.

2, Benjamin v. Benjamin, 15 Conn. 347; 39 Am. Dec. 384; Meader v. Page, 39 Vt. 306; Savage v. Davis, 18 Wis. 608; Humes v. Tabor, 1 R. I. 464; McAfee v. Robertson, 41 Tex. 355; Butts v. Newton, 29 Wis. 632; Mitchell v. Hughes, 24 Ill. App. 308.

3, Butts v. Newton, 29 Wis. 632; Benjamin v. Benjamin, 15 Conn. 347; 39 Am. Dec. 384.

4, Meek v. Pierce, 19 Wis. 300.

5, Sawyer v. Cutting, 23 Vt. 486; Reakert v. Sanford, 5 Watts & S. (Pa.) 164.

6, Hale v. Danforth, 40 Wis. 382; Robertson v. Brost, 83 Ill. 116.

7, Trepp v. Barker, 78 Ill. 146; Bates v. Sabin, 64 Vt. 511.

8, Arndt v. Harshaw, 53 Wis. 269; Wichita Co. v. Kuhn, 38 Kan. 104; Paulson v. Hall, 39 Kan. 365. But see, Sanborn v. Cole, 63 Vt. 590.

§ 760. Evidence of husband and wife tending to criminate or contradict the other — Collateral proceedings. — Although the courts were at first inclined to hold that a husband or wife ought not to be permitted to give any evidence that might even tend to criminate each other,¹ yet it was long ago settled at common law that, *in collateral proceedings* not immediately affecting their mutual interests, either husband or wife might be a witness, although the evidence of one tended to criminate the other, or to contradict the other, or to subject the other to a legal demand.² It was, however, held otherwise where the interests of the other were directly involved, and would be concluded by the verdict, whether a party or not.³ But when the liability of the husband was contingent merely, and he was not a party, the wife might be a witness.⁴ In controversies between third persons, the testimony of the husband and wife was *not excluded merely because they might contradict each other*, or because the testimony of one might impair the credit to be given to that of the other. The fact that such contradiction might lead to family discord was not.

deemed so serious an objection as to prevent a failure of justice. Mr. Taylor has pointed out that the contrary rule would lead to great injustice: "Since the competency of the witness would then depend upon the marshalling of the evidence; and the testimony of a husband might be rendered inadmissible for the defendant from the accidental circumstances of his wife having been previously called on the part of the plaintiff, though had the defendant been entitled to begin, the husband would have been examined and the wife rejected. In Ireland, all the judges have held that the evidence of a wife could not be rejected on the ground that she was brought to contradict the testimony of her husband, even where he was the prosecutor of an indictment."⁵ There has been more difficulty in determining whether the testimony of husband or wife should be received in an action where the other spouse is not a party, and where the verdict would not be conclusive, but *where the testimony would nevertheless tend to criminate*. For example, it has frequently been held, on an indictment of one for adultery with a wife, that, though the wife is not also joined, the husband will be an incompetent witness for the state.⁶ But, in the opinion of the author, the view that the witness is incompetent merely because of the fact that the testimony might give information which would facilitate a

conviction in another case can hardly be sustained on principle, although, in such cases, the witness may, perhaps, claim his or her privilege, and decline to testify.¹

1, *R. v. Inhabitants of Cliviger*, 2 T. R. 263.

2, 1 Phill. Ev. (3rd ed.) 71. See note, 27 Am. Dec. 377.

3, *Kusch v. Kusch*, 143 Ill. 353; *Arn v. Mathews*, 39 Kan. 273; *Young v. Gilman*, 46 N. H. 484; *DeFarges v. Ryland*, 87 Va. 404; 24 Am. St. Rep. 659; *Southerland v. Ross*, 140 Pa. St. 379; *Harrington v. Sedalia*, 98 Mo. 583; *Blanchard v. Moors*, 85 Mich. 380; *Way v. Harriman*, 126 Ill. 132; *Storrs v. Storrs*, 23 Fla. 274; *Banister v. Ovitt*, 64 Vt. 580; *McEwen v. Shannon*, 64 Vt. 583.

4, *Fitch v. Hill*, 11 Mass. 285; *Dyer v. Homer*, 22 Pick. 253; *Griffin v. Brown*, 2 Pick. 303.

5, *Tayl. Ev. sec.* 1370.

6, *Com. v. Gordon*, 2 Brewst. (Pa.) 569; *State v. Welsh*, 26 Me. 30; *People v. Fowler*, (Mich.) 62 N. W. Rep. 572; *Com. v. Sparks*, 7 Allen 534; *State v. Gardner*, 1 Root (Conn.) 485; *Howard v. State*, 94 Ga. 587; *Birge v. State*, 78 Ala. 435. See note, 27 Am. Dec. 379.

7, See discussion, 2 Bennett & Heard Cr. Cas. 253; *R. v. Bathwick*, 2 Barn. & Adol. 639; *R. v. All Saints*, 6 Maule & S. 194; *R. v. Halliday*, 8 Cox Cr. Cas. 298; *Com. v. Reid*, 8 Phila. (Pa.) 385; *State v. Buggs*, 9 R. I. 361; *State v. Marvin*, 35 N. H. 22; *State v. Dudley*, 7 Wis. 664, where the witness was a divorced husband.

§ 761. Other exceptions to the general rule — Divorce. — In another place, we have discussed the exception which arose from the necessity of the case, when actions were based upon the personal violence or misconduct of one spouse toward the other.¹ On similar

grounds of necessity, a wife or husband might testify, where the other was a party, to prove the contents of lost trunks or packages, there being no other evidence of the fact.² In still other cases, where one spouse was competent at common law, the other was also competent.³ At common law in civil actions, no exception to the general rule arose from the fact that the *action was between husband and wife*, and concerned property rights.⁴ Formerly an action for *divorce* was governed by the general rules already stated, and neither party could be a witness,⁵ except that in equity the usual rule obtained, and the answer might be made evidence by the act of the complainant in demanding that the charges of the bill be answered under oath.⁶ Statutes have, however, been adopted in England⁷ and in many of the states, which have, at least partially, removed the disability of the husband and wife to testify in those cases *where a witness is a party*, and in such cases, either plaintiff or defendant may testify in divorce suits, as in other actions, and it is now familiar practice for either spouse to testify in actions for divorce.⁸ But in a recent case in Rhode Island, where the statute provides that either party to a divorce proceeding might testify in the case, the court was of the opinion that this statute did not repeal the other statute to the effect that neither husband nor wife should be permitted to give any testi-

mony tending to criminate the other, or to disclose confidential communications.⁹

1, See sec. 753 *supra*.

2, Illinois Ry. Co. v. Taylor, 24 Ill. 323; Sassen v. Clark, 17 Ga. 242; McGill v. Rowland, 3 Pa. St. 451.

3, Wixson v. People, 5 Park. Cr. (N. Y.) 119; Seigling v. Main, 1 McMull. (S. C.) 252; Abbott v. Clark, 19 Vt. 444; State v. Anthony, 1 McCord (S. C.) 285; Meni v. Rathbone, 21 Ind. 454; Howell v. Zerbee, 26 Ind. 214; Mitchell v. Clagett, 9 Md. 42; Hall v. Murphy, 14 Tex. 637; Robinson v. Hutchinson, 31 Vt. 443.

4, Gray v. Gray, 39 N. J. Eq. 511.

5, Perkins v. Perkins, 88 N. C. 41; Manchester v. Manchester, 24 Vt. 649; Briggs v. Briggs, (R. I.) 26 At. Rep. 198; Dwelly v. Dwelly, 46 Me. 377; Anonymous, 58 Miss. 15.

6, Latham v. Latham, 30 Gratt. (Va.) 307; Derby v. Derby, 21 N. J. Eq. 36; Richmond v. Richmond, 10 Verg. (Penn.) 343; Mosser v. Mosser, 29 Ala. 313; Marsh v. Marsh, 16 N. J. Eq. 391; 84 Am. Dec. 164; Banta v. Banta, 3 Edw. Ch. (N. Y.) 295.

7, 32 & 33 Vict. ch. 68 sec. 3.

8, See statutes of the jurisdiction.

9, Briggs v. Briggs, (R. I.) 26 At. Rep. 198.

762. The marriage to be proved by the party objecting.—There is no presumption that a witness is incompetent; and the party insisting on the disability to testify must prove that the relation of husband and wife exists. But the husband or wife, who is a party and who objects to the competency of that witness, may testify to the marriage;¹ and the supposed husband or wife may be examined on the *voir dire* as to facts showing the

invalidity of the marriage.¹ At common law, the exclusion of the husband or wife as a witness, where the other spouse was a party, depended upon grounds of public policy applicable solely to cases where the lawful relation of husband and wife existed. The witness was not excluded, unless *de jure* the husband or wife of the party.² Hence the rule did not apply when the witness lived in adulterous intercourse or as the mistress of another, although they claimed to be husband and wife, unless the relationship of husband and wife actually existed.³

1, Dixon v. People, 18 Mich. 84.

2, Rex v. Bramley, 6 T. R. 330; Rex v. Bathwick, 2 Barn. & Adol. 646; Wells v. Fletcher, 5 Car. & P. 12; State v. Brown, 28 La. An. 279; Tayl. Ev. sec. 1366.

3, Rex v. Sergeant, Ryan & M. 352; Batthews v. Galindo, 4 Bing. 610; 3 Car. & P. 238; Wells v. Fletcher, 5 Car. & P. 12; Dennis v. Crittenden, 42 N. Y. 542; Miles v. United States, 103 U. S. 304; Sims v. State, 30 Tex. App. 605.

4, Batthews v. Galindo, 4 Bing. 610; Flanagan v. State, 25 Ark. 92; Dennis v. Crittenden, 42 N. Y. 542; Wells v. Fletcher, 5 Car. & P. 12; Campbell v. Twemlow, 1 Price 31; Divoll v. Leadbetter, 4 Pick. 219; People v. McCraney, 6 Park. Cr. (N. Y.) 49; State v. Taylor, Phill. (N. C.) 508; Rex v. Serjeant, Ryan & M. 352; R. v. Madden, 14 Up. Can. Q. B. 588; State v. Patterson, 2 Ired. (N. C.) 346; Finney v. State, 3 Head (Tenn.) 544; State v. Johnson, 12 Minn. 476.

§763. Effect of statutes on the subject.—When we come to the consideration of the effect of statutes upon the common law rules on the subject under consideration, we

find a discouraging lack of uniformity. One of the few general rules on this subject, about which there is little difference of opinion, has arisen out of the very general adoption of statutes which have removed all *objections* to the competency of witnesses *on account of interest*. It has generally been agreed that the statutes removing the disqualifications by reason of interest *do not affect the disability of husband and wife* as witnesses for or against each other. The disability rests on grounds of public policy, and the necessity of preserving the harmony of the marriage relation, and not merely upon the ground of interest of parties or witnesses.¹ In England, very radical changes have been made in the common law rules; and husband and wife are now, in general, competent witnesses for or against each other in civil actions, except that they cannot be compelled to disclose communications made to each other during the marriage.² In the *United States courts*, the following rules govern: "No witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried. * * * In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law and in equity and admiralty."³ But this stat-

ute has been held inapplicable to criminal trials as they are not embraced within the words "at common law."⁴ It is obvious, however, that the state laws cannot control as to the competency of witnesses, where the federal constitution or statute has already established the rules that shall govern in those cases.⁵ By the rules of construction which have been adopted, it will be seen that this statute does not change the common law rule with respect to the competency of husband and wife as witnesses, except so far as to conform the practice to the law of the forum.⁶ There is hardly a state in which the common law rules remain intact on this subject, but there is such wide dissimilarity between the statutes of the several states and the decisions based thereon that no full discussion of such statutes would be practicable within the scope of this work. In a large number of states, the precaution has been taken to expressly declare the common law rule that *communications* between husband and wife *during marriage* are incompetent;⁷ but, in some states, such communications may be received by *consent* of the other spouse.⁸ Generally these statutes exclude "communications" made between the husband and wife during marriage, although in a few, the language of the statute is "confidential communications,"⁹ or "private communications."¹⁰

1, *Lucas v. Brooks*, 18 Wall. 436; *Dawley v. Ayers*, 23 Cal. 108; *Stanley v. Stanton*, 36 Ind. 445; *McKeen v. Frost*,

46 Me. 239; Kelly v. Drew, 12 Allen 107; Gee v. Scott, 48 Tex. 510; Cram v. Cram, 33 Vt. 15; Dunlap v. Hearn, 37 Miss. 471; Haworth v. Norris, 28 Fla. 763; Parkhurst v. Berdell, 110 N. Y. 386. See valuable note giving the substance of many statutes, Greenl. Ev. sec. 334.

2, Tayl. Ev. sec. 1352.

3, Rev. Stat. U. S. sec. 858; Mutual Life Ins. Co. v. Robinson, 58 Fed. Rep. 723; Logan v. United States, 144 U. S. 302; United States v. Hall, 53 Fed. Rep. 352; Connecticut Ins. Co. v. Trust Co., 112 U. S. 250; Bruguier v. United States, 1 Dak. 5, an indian held competent.

4, Logan v. United States, 144 U. S. 263; United States v. Hall, 53 Fed. Rep. 352.

5, Potter v. Bank, 102 U. S. 165; Connecticut Ins. Co. v. Schaefer, 94 U. S. 458; Stephens v. Bernay, 42 Fed. Rep. 488.

6, Lucas v. Brooks, 18 Wall. 436; Packet Co. v. Clough, 20 Wall. 528; Dean v. Metropolitan Ry. Co., 119 N. Y. 540.

7, See the statutes of the jurisdiction.

8, Rev. Stat. Cal. sec. 1881; Rev. Stat. Wis. sec. 4072; Rev. Stat. Dak. sec. 5260; N. Y. Code sec. 831; Wolford v. Farnham, 44 Minn. 159; Eaton v. Knowles, 61 Mich. 625.

9, Rev. Stat. Wis. sec. 4072; N. Y. Code sec. 831. See sec. 754 *supra*.

10, Mass. Pub. Stat. 1882 ch. 109 p. 987.

§ 764. **Same, continued.**—We have already discussed the exception under which one spouse was allowed to testify against the other in case of prosecution for *personal injury* to the witness. In nearly every state, this exception has been preserved, in many instances by express statute. In some states,

the statute has somewhat enlarged the scope of this common law exception. Thus, it has been held, under statutes allowing husband and wife to testify against one another on a criminal prosecution for a "crime" or an "offense" committed by one against the other, that such testimony may be received in prosecutions for bigamy and adultery; and that the rule is not confined to cases of personal violence upon the witness.¹ It will be found that the statutes quite generally permit husband and wife to testify in civil actions between themselves, as in actions for divorce, or in controversies respecting property rights. In some instances, the statute makes such provision in specific terms; in others, the statute provides in general terms that parties to an action may testify in their own behalf, or that all persons, with certain designated exceptions, are competent. In a few states, the distinction is made by statute that, with certain exceptions, husband and wife may be *witnesses for, but not against each other.*² In New York, the court held, in construing such a statute, that, where a defendant on trial for murder objected to having his wife sworn as a witness for the prosecution, the jury might properly infer that the testimony would have been unfavorable.³ In some jurisdictions, the incompetency of the husband or wife as a witness may, with certain restrictions, be waived by the *consent of the other*

*spouse.*⁴ In Minnesota, it was held under such a statute that, where a wife, the defendant, had objected to the examination of her husband as a witness, and refused her consent, she might still call him as her own witness.⁵ The California statute is as follows: "A husband cannot be examined for or against his wife, without her consent, nor a wife for or against her husband, without his consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or a proceeding by one against the other; nor to a criminal action or proceeding for a crime committed by one against the other."⁶ This statute is given for the reason that it has been substantially adopted by a group of states; and it well illustrates the tendency of modern legislation on the subject.⁷

1, *Roland v. State*, 9 Tex. App. 277; 35 Am. Rep. 743; *State v. Bennett*, 31 Iowa 25; *State v. Sloan*, 55 Iowa 217.

2, Iowa, Code secs. 3641, 3642; *Parcell v. McReynolds*, 71 Iowa 623; Texas, Crim. Code art. 735 sec. 2442.

3, *People v. Hovey*, 92 N. Y. 554.

4, Maine, Rev. Stat. 1883 sec. 93 p. 707; Michigan, Comp. L. sec. 4340; Minnesota, Gen. Stat. 1878 ch. 73 sec. 10; *Wolford v. Farnham*, 44 Minn. 159; *Fitzgerald v. Meyer*, 37 Neb. 50; California, Rev. Stat. sec. 1881; *Blanchard v. Moors*, 85 Mich. 380; Oregon, Stat. 1887 sec. 1366. In some states such consent only relates to confidential communications, Wisconsin, Rev. Stat. sec. 4072; New York, Code sec. 831.

5, *Wolford v. Farnham*, 44 Minn. 159.

6, California, Code Civ. Proc. sec. 1881.

7, Compare the statutes of Dakota, Oregon, Idaho, Arizona, Nevada, Montana, Washington, Colorado and Minnesota.

1765. General tendency of the statutes.—From the wide diversity of statutes in the different jurisdictions, it sufficiently appears that the practitioner must become familiar with the statute of the forum, and observe the changes which have been made from the common law rule. It may be added that the tendency of legislation is undoubtedly toward the removal of the common law disabilities. Modern legislation has greatly enlarged the powers of married women in respect to making contracts, the bringing of actions and in the control of their property and person. The right to make contracts, and to bring actions is, in some cases, a barren one, unless accompanied by the right to give testimony in its support; and it has been generally found necessary that those who are parties should be competent witnesses.¹ The fact that married women are far less dependent, than formerly, upon the caprice of their husbands, in respect to their control of person, property and children, may, at least to some extent, remove the objection to the disclosure even of communications made during marriage. It may be conceded that there are objections to any policy which may compel

husband and wife to appear in court in an attitude of hostility to each other. On the other hand, there are objections to arbitrary rules of evidence which suppress the truth in the administration of justice. In very many branches of the law of evidence, ancient rules excluding certain classes of testimony have been compelled to yield; and it would be by no means surprising, if, in the near future, the competency of husband and wife as witnesses would cease to be questioned, except as to those confidential communications with each other which are induced by the marital relation. Indeed, in England and in a few states, the rule has already been adopted that husband and wife are competent to testify for or against each other in civil actions as to all facts except confidential communications.

1, *Kingsbury v. Buckner*, 134 U. S. 650.

§ 766. Attorneys not allowed to disclose confidential communications.—It is a familiar and long established rule of the common law that an attorney or counselor cannot disclose communications made by his client to him or the advice given by him in the course of his professional employment, without the consent of the client.¹ Mr. Stephen illustrates the scope of the rule in a striking manner, and yet without the slightest exaggeration, when he says: "A man may, with perfect safety, tell a barrister or attor-

ney in his professional capacity that he has committed murder or treason."² It is natural enough that such a rule should have received severe criticism; and it is one of those rules of the common law which Mr. Bentham vigorously assailed.³ But communications of this character are still held privileged both in the courts of England and of America. The rule is not based upon any disposition to favor or confer privileges upon attorneys, but "it is out of regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceeding."⁴ It is deemed less dangerous that there should be an occasional failure of justice than that no person should feel at liberty to state to his lawyer, without concealment or reservation, the facts constituting his cause of action or defense. "Truth, like all other good things, may be loved unwisely, may be pursued too keenly, may cost too much; and surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation, uneasiness, suspicion and fear into those communications which must take place, and which, unless in a condition of perfect security, must take

place uselessly or worse, are too great a price to pay for truth itself."⁵

1, *Chirac v. Reinicker*, 11 Wheat. 280; *Brayier v. Fortune*, 10 Ala. 516; *Stephens v. Mattox*, 37 Ga. 289; *Dietrich v. Mitchell*, 43 Ill. 40; 92 Am. Dec. 99; *Bowers v. Briggs*, 20 Ind. 139; *Crisler v. Garland*, 19 Miss. 136; *Gray v. Fox*, 43 Mo. 570; 97 Am. Dec. 416; *Stuyvesant v. Peckham*, 3 Edw. Ch. (N. Y.) 579; *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; *Miller v. Weeks*, 22 Pa. St. 89; *Dowell v. Dowell*, 3 Head (Tenn.) 502; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Steph. Ev. art. 115*; 1 *Whart. Ev. sec. 576*; 1 *Phill. Ev. (3rd ed.) 162*. For an extended review of the early English cases, see *Whiting v. Barney*, 30 N. Y. 330. See note, 36 Am. Rep. 631.

2, *General View of the Criminal Law* by J. F. Stephen 293.

3, *Bentham Rationale of Judicial Evidence*.

4, *Greenough v. Gaskell*, 1 Mylne & K. 103.

5, *Pearse v. Pearse*, 1 De Gex & S. 28; *Bolton v. Corp. of Liverpool*, 1 Mylne & K. 94; *Connecticut Mut. Ins. Co. v. Schaefer*, 94 U. S. 457; *Whiting v. Barney*, 30 N. Y. 341.

2767. Same—The privilege that of the client—Not confined to cases pending.—Since the privilege rests on grounds of public policy, and is indispensable to the administration of justice, the right is not that of the attorney, but that of the client. Hence, the rule remains the same, although the attorney is willing to disclose the facts; he cannot be allowed to make such disclosure, except by the consent of his client.¹ Nor does the trial judge necessarily wait for the question to be raised by counsel or client, but may enforce the privilege of his own

motion.² The privilege is *not confined* to communications given in respect to *cases actually pending*. The litigation may be only anticipated, or it may have terminated; it is sufficient that the communication has been made by the client to his legal adviser for the purpose of professional aid in respect to matters in which such aid may properly be given, and in respect to which litigation may possibly arise.³ This rule has been held to apply to statements made by the client to his attorney while drawing a deed,⁴ or the assignment of a mortgage,⁵ or a warrant of attorney,⁶ or an affidavit.⁷ Many other instances might be cited illustrating the well settled rule that the communications are not confined to those made to counsel and attorneys in relation to the prosecution or defense of suits at law, although many of the earlier cases made such a restriction.⁸ The client may claim the benefit of the rule, *although no fee has been paid*, or although there has been no formal retainer.⁹ The privilege has been recognized, even in cases where the attorney did not consider that he was acting as counsel, when the circumstances were such as to show that the relation of attorney and client actually existed. "Communications made to an attorney in the course of any personal employment, relating to the subject thereof, and which may be supposed to be drawn out in consequence of the rela-

tion in which the parties stand to each other are under the seal of confidence, and entitled to protection as privileged communications." ¹⁰ Although the *burden* of showing that the communication is privileged rests on the one asserting the facts, ¹¹ whenever the communication relates to a matter so connected with the employment as attorney as to afford a presumption that it was drawn out by the relation of attorney and client, it is privileged from disclosure. ¹² The privilege exists, although there is *no injunction of secrecy*; ¹³ and communications made to the district attorney or other *public prosecutor* are governed by the same rule, as, if there is any difference, the confidence reposed in the attorney is, in such cases, even more sacred than that reposed in others. ¹⁴

1, Greenough v. Gaskell, 1 Mylne & K. 101; Chirac v. Reinicker, 11 Wheat. 293; Jenkinson v. State, 5 Blackf. (Ind.) 465; Foster v. Hall, 12 Pick. 89; 22 Am. Dec. 400; Tays v. Carr, 37 Kan. 141; Swain v. Humphreys, 42 Ill. App. 370; Bull N. P. 284.

2, People v. Atchison, 40 Cal. 284.

3, Walsingham v. Goodriche, 3 Hare. 124; Desborough v. Rawlins, 3 Mylne & C. 515; Greenough v. Gaskell, 1 Mylne & K. 98; Bacon v. Frisbie, 80 N. Y. 394; 22 Am. Dec. 400; Wetherbee v. Ezekiel, 25 Vt. 47; Parkhurst v. McGraw, 24 Miss. 134; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; Aiken v. Kilburn, 27 Me. 252; Johnson v. Sullivan, 23 Mo. 474; Parker v. Carter, 4 Munf. (Va.) 273; 6 Am. Dec. 513; Beltzhoover v. Blackstock, 3 Watts (Pa.) 20; 27 Am. Dec. 330; Foster v. Hall, 12 Pick. 89; 22 Am. Dec. 400; Dudley v. Beck, 3 Wis. 274; State v. James, 34 S. C. 49; McLellan v. Longfellow, 32 Me. 496; 54

Am. Dec. 599; *Peek v. Boone*, 90 Ga. 767; *Denver Tram Co. v. Owens*, 20 Col. 107; *Carter v. West*, 93 Ky. 211.

4, *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Barry v. Corille*, 7 N. Y. S. 36, where it was held that the attorney may state the fact that he drew such deed.

5, *Moore v. Bray*, 10 Pa. St. 519.

6, *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 595; 49 Am. Dec. 189.

7, *Williams v. Fitch*, 18 N. Y. 546; *Hernandez v. State*, 18 Tex. App. 134; 51 Am. Rep. 295.

8, *Williams v. Mudie*, 1 Car. & P. 158; *Cromack v. Heathcote*, 4 Moore 358; *Broad v. Pitt*, 3 Car. & P. 518; *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385, and cases cited.

9, *March v. Ludheim*, 3 Sandf. Ch. (N. Y.) 35; *McManus v. State*, 2 Head (Tenn.) 213; *Sargent v. Hampden*, 38 Me. 581; *Hunter v. Vam Bomhorst*, 1 Md. 504; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Earle v. Grant*, 46 Vt. 113; *Croos v. Riggins*, 50 Mo. 335; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627, cases cited and note; *Denver Tram Co. v. Owens*, 20 Col. 107.

10, *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627; *Getzlaff v. Seliger*, 43 Wis. 297; *Mowell v. Van Buren*, 77 Hun (N. Y.) 569.

11, *Earle v. Grant*, 46 Vt. 113; *Sharon v. Sharon*, 79 Cal. 633; *Mowell v. Van Buren*, 77 Hun (N. Y.) 569.

12, *Turguand v. Knight*, 2 M. & W. 98; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627.

13, *McLellan v. Longfellow*, 32 Me. 494; 54 Am. Dec. 599; *Wheeler v. Hill*, 16 Me. 329.

14, *Vogel v. Gruaz*, 110 U. S. 311; *Oliver v. Pate*, 43 Ind. 132; *Marks v. Beyfus*, 25 Q. B. Div. 494; *State v. Houseworth*, (Iowa) 60 N. W. Rep. 221.

§ 768. Same — Duration — Client may claim the privilege — Extends to writings.—Matters thus disclosed in pro-

professional confidence cannot be revealed by the attorney, although the litigation has ceased or the relation of attorney and client has been terminated by death or otherwise, or although the testimony is offered in an action between other parties.¹ The *client*, as well as the attorney, *may refuse to testify* to communications of the character under discussion, as the rule would be of no value, if it might be evaded by compelling the client to disclose that which the attorney is bound to withhold.² This privilege extends even to those cases where the client offers himself as a witness in his own behalf.³ The rule is *not limited* in its application to *advice given or opinions* stated, but extends to all communications by either party, whether oral or written, properly relating to the business in hand, and to all *documents*, books, papers or instruments which may be properly used by the client to convey professional information to his attorney.⁴ On the same principle, the privilege extends to a statement of facts or a *case prepared* for the purpose of obtaining the advice of counsel,⁵ and to the *opinion of counsel* based upon such statement.⁶ So wherever the client would be exempted from producing *title deeds* or documents of any kind, the attorney will not be compelled to produce such documents, if they have been intrusted to his care by reason of the relation of attorney and client, nor will he be re-

quired to testify as to their contents,⁷ or to disclose any information obtained from *books or papers* shown to him by the client, or placed in his hands in his character as counsel.⁸ But the attorney may be called as a witness to prove the *existence* of such a *document*, and that it is in his possession, so as to entitle the opposite party, after due notice to produce and a refusal, to give parol evidence of the contents.⁹ On the principles which have been stated respecting oral communications between attorney and client, the protection does not include written communications to a solicitor or attorney, unless received in that capacity.¹⁰ Nor does it apply to written statements made by third persons, although they are confidential.¹¹ The question of privilege is always *to be determined by the court*;¹² and, if it is alleged that documents are privileged, the court may inspect them to determine that question.¹³

1, *Rex v. Withers*, 2 Camp. 578; *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400; *Whitney v. Barney*, 38 Barb. (N. Y.) 393. See sec. 779 *infra*.

2, *State v. White*, 19 Kan. 445; 27 Am. Rep. 137; *Bigler v. Reyher*, 43 Ind. 112; *Hemenway v. Smith*, 28 Vt. 701.

3, *Duttenhofer v. State*, 34 Ohio St. 91; 32 Am. Rep. 362; *Bigler v. Reyher*, 43 Ind. 112; *Barker v. Kuhn*, 38 Iowa 395; *Hemenway v. Smith*, 28 Vt. 701; *State v. White*, 19 Kan. 445; 27 Am. Rep. 137 and note. Contra, *Woburn v. Henshaw*, 101 Mass. 193; 3 Am. Rep. 333. A witness may be asked if he has told his attorney certain facts that he has given in evidence, *State v. Tall*, 43 Minn. 273.

4, *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec.

117; *Durkee v. Leonard*, 4 Vt. 612; *Anonymous*, 8 Mass. 370; *Lynde v. Judd*, 3 Day (Conn.) 499; *Mills v. Oddy*, 6 Car. & P. 728; *Lengsfeld v. Richardson*, 52 Miss. 443; *Selden v. State*, 74 Wis. 271; 17 Am. St. Rep. 144; *Nelson v. Becker*, 32 Neb. 99; *Mathews v. Hoagland*, 48 N. J. Eq. 455.

5, *Bolton v. Corp. of Liverpool*, 1 Mylne & K. 88; *Bacon v. Frisbie*, 80 N. Y. 394; 36 Am. Rep. 627 and note. But the privilege does not extend to fictitious cases, *Haley v. Bank*, 21 Nev. 127.

6, *Hughes v. Biddulph*, 4 Russ. 190; *Lord Walsingham v. Goodriche*, 3 Hare 122.

7, *Hibbard v. Knight*, 2 Exch. 11; *Volant v. Soyer*, 13 C. B. 231; 76 E. C. L. 230; *Anonymous*, 8 Mass. 370; *Jackson v. Burtis*, 14 Johns. 391; *Lynde v. Judd*, 3 Day (Conn.) 499; *Durkee v. Leland*, 4 Vt. 612; *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25, letters; *Stokoe v. St. Paul & C. Ry. Co.*, 40 Minn. 545; *Selden v. State*, 74 Wis. 271; 17 Am. St. Rep. 144.

8, *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; *Dover v. Hawell*, 58 Ga. 572; *Arbuckle v. Templeton*, 65 Vt. 205. Many of the cases hold that documents are not privileged, if they come into the possession of a third party by any means, even if they are stolen, *Lloyd v. Mostyn*, 10 M. & W. 481. But see, *Ligett v. Gleen*, 51 Fed. Rep. 381, which holds some unequivocal act on the part of the client necessary to remove the privileged character of the document.

9, *Jackson v. M'Vey*, 18 Johns. 330; *Brandt v. Klein*, 17 Johns. 335. In such cases, the proper practice is to give notice to produce, *McPherson v. Rathbone*, 7 Wend. 218; *Stokoe v. St. Paul & C. Ry. Co.*, 40 Minn. 545.

10, *Thomas v. Rawlings*, 27 Beav. 140.

11, *Hopkinson v. Lord Burghly*, 2 L. R. (Ch.) 447; *Bustros v. White*, 1 Q. B. Div. 423; *Anderson v. Bank*, 2 Ch. Div. 644.

12, *Childs v. Merrill*, 66 Vt. 302.

13, *Hughes v. Boone*, 102 N. C. 137; *Harris v. Dougherty*, 74 Tex. 1. Contra, *Volant v. Soyer*, 13 C. B. 231; 76 E. C. L. 230.

§769. Communications must be in the nature of professional intercourse.—It is clearly implied, from what has already been stated, that the communication is not privileged, unless made in the relation of professional intercourse.¹ Thus, the privilege does not extend to information received by one in the character of a friend and not as counsel;² nor to a simple inquiry made of an attorney as to the existence of a matter of fact;³ nor to communications which do not relate to the subject matter of the consultation;⁴ nor to communications made to one erroneously supposed to be an attorney;⁵ nor to communications made to a solicitor of patents;⁶ nor to communications made to an abstracter of titles who does not give professional advice, even though he be an attorney;⁷ nor to information gained by the attorney from other sources than from his client;⁸ nor to statements made by a party to one who assists him in justice court, but who is not an attorney;⁹ nor to statements made to one who has been formerly his attorney, but is not such attorney at the time,¹⁰ nor to a communication made to an attorney, after he has refused to take the case of the party making it.¹¹ On the same principle, it is held that, where an attorney is employed to draw a deed or other conveyance, but is in no way consulted as to the legal effect of the instrument, he is not prevented by the rule under discus-

sion from disclosing the statements made to him by the grantor.¹² Since *interpreters, agents, clerks and assistant attorneys* must be sometimes employed as a means of communication between attorney and client, the privilege extends to such statements as are made to them in the regular course of their employment as such.¹³ But it is held that statements made to a student in a lawyer's office, who is not acting as an agent or clerk, are not privileged.¹⁴ Nor does the privilege extend to *third persons*, present at a conference between attorney and client.¹⁵ The same principle which protects the communication between attorney and client from disclosure would seem to call for the extension of the privilege to *communications between the party and his attorney and their witnesses made during necessary preparations for trial*. Several elementary writers have given their approval to such an extension of the privilege, but it has little support in the adjudicated cases.¹⁶

1, *Sharon v. Sharon*, 79 Col. 633. *In re Turner's Estate*, 167 Pa. St. 609. See also the cases below cited.

2, *Coon v. Swan*, 30 Vt. 6; *Goltra v. Wolcott*, 14 Ill. 89; *Hoffman v. Smith*, 1 Caines (N. Y.) 157; *Lloyd v. Davis*, 2 Ind. App. 170.

3, *Plano Manfg. Co. v. Frawley*, 68 Wis. 577; *Allen v. Harrison*, 30 Vt. 219.

4, *State v. Mewherter*, 46 Iowa 88.

5, *Sample v. Frost*, 10 Iowa 266; *Barnes v. Harris*, 7 Cash. 576; 54 Am. Dec. 734.

6, *Brungger v. Smith*, 49 Fed. Rep. 124.

7, *Stalling v. Hullum*, 79 Tex. 421.

8, *Marsh v. Keith*, 1 Drew. & S. 342; *Mackenzie v. Yeo*, 2 Curt. (U. S.) 866; *Greenough v. Gaskell*, 1 Mylne & K. 104; *Crosby v. Berger*, 11 Paige (N. Y.) 377; 42 Am. Dec. 117; *Chillicothe Ry. Co. v. Jameson*, 48 Ill. 281.

9, *Brayton v. Chase*, 3 Wis. 456. But it was held otherwise where the person had been regularly employed in justice court for many years, *Benedict v. State*, 44 Ohio St. 679.

10, *Carroll v. Sprague*, 59 Cal. 655.

11, *Theisen v. Dayton*, 82 Iowa 74; *Plano Manfg. Co. v. Frawley*, 68 Wis. 577; *Galtra v. Wolcott*, 14 Ill. 89; *Tucker v. Finch*, 66 Wis. 17.

12, *Hatton v. Robinson*, 14 Pick. 416; 25 Am. Dec. 415; *DeWolf v. Strader*, 26 Ill. 225; 79 Am. Dec. 371; *Borum v. Fouts*, 15 Ind. 50; *Mutual Life Ins. Co. v. Carey*, 54 Hun (N. Y.) 493; *Caldwell v. Davis*, 10 Col. 481; *Todd v. Munson*, 53 Conn. 579; *Machette v. Wauless*, 2 Col. 169; *O'Neil v. Murry*, 6 Dak. 107; *Hebbard v. Haughian*, 70 N. Y. 61; *Aultman Co. v. Doggs*, 50 Mo. App. 280. For a collection of cases, see *Hageman Priv. Com. ch. V*.

13, *Foster v. Hall*, 12 Pick. 89; 22 Am. Dec. 400, citing English cases; *Landsberger v. Gorham*, 5 Cal. 450; *Taylor v. Forster*, 2 Car. & P. 195; *Foot v. Hayne*, 1 Car. & P. 545; *Jackson v. French*, 3 Wend. 337; 20 Am. Dec. 699; *Brand v. Brand*, 39 How. Pr. (N. Y.) 193; *Parker v. Carter*, 4 Munf. (Va.) 273; 6 Am. Dec. 513; *Andrews v. Solomon*, 1 Peters C. C. 356; *Sibley v. Waffle*, 16 N. Y. 180.

14, *Barnes v. Harris*. 7 Cush. 576; 54 Am. Dec. 734; *Holmes v. Kimball*, 22 Vt. 555.

15, *Walker v. State*, 19 Tex. App. 176; *Goddard v. Gardner*, 28 Conn. 172; *Hoy v. Morris*, 13 Gray (Mass.) 519; 74 Am. Dec. 650; *Jackson v. French*, 3 Wend. (N. Y.) 337; 20 Am. Dec. 699; *Cotton v. State*, 87 Ala. 75; *Springer v. Byrnes*, 137 Ind. 15; *Tyler v. Hall*, 106 Mo. 313; *People v. Buchanan*, 145 N. Y. 1; *Perry v. State*, (Idaho) 38 Pac. Rep. 655.

16, *Whart. Ev. sec. 594*; *Hare Disc. (2nd ed.) 151*; *Hage-*

man Priv. Com. sec. 32. The contrary view seems to be taken in *Whitehead v. Gurney*, 1 Younge 541; *Butros v. White*, 1 Q. B. Div. 423; *Anderson v. Bank*, 2 Ch. Div. 658; *Martin v. Bulchard*, 36 L. T. 732.

§ 770. Same—Privilege does not extend to information gained in a casual manner.—The rule does not extend to those facts of which the attorney or solicitor gains knowledge in some casual manner in the course of his employment, and which are not communicated to him by the client.¹ Thus, the attorney may be required to testify as to what has occurred in open court,² or to prove the handwriting of his client.³ Said Lord Mansfield: "I have known an attorney obliged to prove his client's having sworn to and signed the answer upon which he was indicted for perjury." So the lawyer may testify as to his client's state of mind, as that he was too imbecile at a given time to make communications respecting a will,⁴ or to the fact of his employment as attorney,⁵ or the fact of the writing of a note by him in the presence of his client or to the payment of money,⁶ or that he is in possession of money or property belonging to the client,⁷ or the name of the person by whom he was retained, but not the objects or details of such retainer,⁸ or that, in a former suit, a client called himself by a certain name,⁹ and as to the amount of his fees, if relevant.¹⁰ He may state his own conversations with the adverse party,¹¹ or con-

versations with the client which he intended should be communicated to others,¹² or those as to documents which the client ordered him to give to another party,¹³ or conversations between the plaintiff and defendant in his presence.¹⁴ In such cases, it can hardly be claimed that the communications are made confidentially or that either expects his statements to be concealed from the other. And on the same principle, when the attorney assumes the character of a subscribing witness to a deed or other instrument, he may be compelled to testify, not only as to its execution, but as to other facts, for example, as to alterations, as to time of delivery, or whether it was antedated.¹⁵

1, Aultman Co. v. Ritter, 81 Wis. 395.

2, Levers v. Van Buskirk, 4 Pa. St. 309.

3, Brown v. Jewett, 120 Mass. 215; Johnson v. Davenport, 19 John. 134; 10 Am. Dec. 198.

4, Daniel v. Daniel, 39 Pa. St. 191. See sec. 474 *infra*.

5, White v. State, 86 Ala. 69; Brigham v. McDowell, 19 Neb. 407.

6, Chapman v. Peebles, 84 Ala. 283; Rahm v. State, 30 Tex. App. 310.

7, Williams v. Young, 46 Iowa 140; State v. Gleason, 19 Ore. 159.

8, Levy v. Pope, Moody & M. 410; Gower v. Emery, 18 Me. 79; Brown v. Payson, 6 N. H. 443; Chirac v. Reinicker, 11 Wheat. 280.

9, Com. v. Bacon, 135 Mass. 521.

10, Smithwick v. Evans, 24 Ga. 461; Shaughnessy v. Fog, 15 La. An. 330. But on a charge of stealing silver coins, it

was held that the attorney could not be asked in what money he had been paid, *State v. Dawson*, 90 Mo. 149.

11, *Spencely v. Schulenburg*, 7 East 357; *Ford v. Tennant*, 32 L. J. (Ch.) 465; *Gore v. Harris*, 21 L. J. (Ch.) 10; *Paddon v. Winch*, 39 L. J. (Ch.) 627; *Ney v. City of Troy*, 3 N. Y. S. 679; *McLean v. Clark*, 47 Ga. 24.

12, *Bruce v. Osgood*, 113 Ind. 360; *Henderson v. Terry*, 62 Tex. 281; *Ferguson v. McBean*, 91 Cal. 63.

13, *Rousseau v. Bleau*, 131 N. Y. 177.

14, *Cady v. Walker*, 62 Mich. 157; *Parish v. Gates*, 29 Ala. 254; *Hou-e v. House*, 61 Mich. 69; 1 Am. St. Rep. 570 and note; *Whiting v. Barney*, 30 N. Y. 330; 86 Am. Dec. 385; *Dunn v. Amos*, 14 Wis. 106; *Bauer v. Gazette*, 79 Cal. 304; *Tyler v. Tyler*, 126 Ill. 525; *Colt v. McConnell*, 116 Ind. 249; *Appeal of Goodwin Co.*, 117 Pa. St. 514; 2 Am. St. Rep. 696; *Hurlburt v. Hurlburt*, 128 N. Y. 420; *Carey v. Carey*, 108 N. C. 267; *Deuser v. Walkup*, 43 Mo. App. 625; *Sparks v. Sparks*, 51 Kan. 195; *Hanson v. Bean*, 51 Minn. 546. So the attorney may be compelled to produce correspondence between the parties, if in his possession, *Harrisburgh Car Manfg. Co. v. Sloan*, 120 Ind. 156. But the fact that the privileged communications are made in the presence of a third person, a stranger to the suit, does not make the attorney a competent witness as to such communications, *Blount v. Kimpton*, 155 Mass. 378; *Tyler v. Hall*, 106 Mo. 313. But in controversies with third persons, the rule is different, *Gruber v. Barker*, 20 Nev. 453; *McIntyre v. Costello*, 6 N. Y. S. 397; *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495.

15, *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189; *Carlton v. Coombes*, 32 L. J. (Ch.) 284; *Kelly v. Jackson*, 13 Ir. Eq. R. 129; *Patten v. Moor*, 29 N. H. 163; *Coveney v. Tannahill*, 1 Hill 33; 37 Am. Dec. 287. See sec. 774 *infra*.

§ 771. **Privilege not allowed in furtherance of crime.**—It is no part of the lawyer's duty to advise his clients in what

manner they may commit crime or fraud with impunity; hence, the privilege does not extend to communications made in furtherance of prospective criminal acts. "If the witness is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it. No private obligations can dispense with that universal one which lies on every member of society to disclose every design which may be formed contrary to the laws of society to destroy the public welfare."¹ On this principle, it has been held that communications in aid of a contemplated forgery,² or in furtherance of a plan to obtain usurious interest³ or relating to the penalty for a contemplated murder⁴ are not privileged. It was held in New York that the communications which an attorney, from the circumstances, must have known to relate to an *intended fraud* upon creditors, were privileged. Chancellor Walworth in the opinion of the court conceded that the privileged relation between attorney and client ought to be permitted to exist only for honest purposes, and not for the perpetration of fraud or violation of law, but held reluctantly that, under the authorities, the statements in question were privileged.⁵ It would seem, however, that the principle is the same whether the communications relate to the commission of offenses generally punishable by the criminal law or to frauds upon creditors. If, in

either case, attorney and client enter into a conspiracy to violate the law, neither should be allowed to conceal the unlawful purpose under the cloak of professional privilege. There is no confidence as to the disclosure of iniquity.⁶ There should be some independent proof of such wrongful purpose; and the mere suggestion of fraud does not afford sufficient ground for setting aside the general rule.⁷

1, *Armesley v. Lord Anglesea*, 17 How. St. Tr. 1229, 1240, 1243; *Gartside v. Outram*, 26 L. J. (Ch.) 113; *Russell v. Jackson*, 9 Hare 392; *Coveney v. Tannahill*, 1 Hill 30; 37 Am. Dec. 287; *Orman v. State*, 22 Tex. App. 604; 58 Am. Rep. 662; *People v. Van Alstyne*, 57 Mich. 69; *State v. McChesney*, 16 Mo. App. 259; *People v. Mahon*, 1 Utah 205; *Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 600; *Mathews v. Hoagland*, 48 N. J. Eq. 455. See note, 36 Am. Rep. 631.

2, *R. v. Avery*, 8 Car. & P. 596; *R. v. Farley*, 2 Car. & K. 313; *People v. Blakely*, 4 Park. Cr. (N. Y.) 176.

3, *Dudley v. Beck*, 3 Wis. 274; *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557.

4, *Orman v. State*, 24 Tex. App. 604; 58 Am. Rep. 662; *Everett v. State*, 30 Tex. App. 682.

5, *Bank of Utica v. Mersereau*, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189 and cases there cited. The same rule was sanctioned in Vermont, *Maxham v. Place*, 46 Vt. 434. A communication, otherwise privileged, should not be received where the alleged fraudulent scheme is not at all manifest, *Alexander v. United States*, 138 U. S. 353.

6, *Gartside v. Outram*, 26 L. J. (Ch.) 113; *Coveney v. Tannahill*, 1 Hill 33; 37 Am. Dec. 287. See full discussion, citing cases, *Mathews v. Hoagland*, 48 N. J. Eq. 455.

7, *Higbee v. Dresser*, 103 Mass. 523; *Alexander v. United States*, 138 U. S. 353.

§772. Attorney may be witness for client—*Litigation between attorney and client, etc.*—There is nothing in the policy of the law which hinders the attorney of a party, prosecuting or defending in a civil action, from testifying at the call of his client. In some cases, it may be unseemly, especially if counsel is in a position to comment on his own testimony; and the practice, therefore, may very properly be discouraged; but there are also cases in which it may be quite important, if not indispensable, that the testimony should be admitted to prevent an injustice or to redress a wrong. The practice is too common to even require discussion or the citation of authorities. It has frequently been held that the rule as to privileged communications of attorneys does not apply, when *litigation* arises *between attorney and client*, and when their communications are relevant to the issue;¹ and, if it is claimed that the attorney has an interest in the pending litigation, for instance, that his fee is contingent on the result, he may be required to state such fact, and the communications with his client relating thereto.² On the same principle, attorneys have been compelled to disclose communications with their clients, *when made parties* in supplemental proceedings;³ and when an attorney, though acting professionally, receives, at his client's request, a deed of land and conveys it to a

third party, no consideration being paid, he may be compelled to disclose the facts.⁴

1, *Naive v. Baird*, 12 Ind. 318; *Snow v. Gould*, 73 Me. 540; 43 Am. Rep. 604; *Mitchell v. Bromberger*, 2 Nev. 345.

2, *Moats v. Rymer*, 18 W. Va. 642; 41 Am. Rep. 703; *Eastman v. Kelly*, 1 N. Y. S. 866.

3, *State v. Gleason*, 19 Ore. 159.

4, *Hager v. Shindler*, 29 Cal. 47.

§ 773. Instructions for drawing wills.

By the weight of authority, it is held that the reason of the general rule does not apply to communications made to an attorney by a testator while giving instructions for drafting a will; that the protection which the rule gives is the protection of the client, and that it cannot be said to be for the interest of the testator, in a controversy between other parties, to have those declarations excluded which are relevant, and which were necessary to the proper execution of his will.¹ This is especially true when those attacking the will seek to take advantage of the privilege.² The attorney who has drafted a will may prove its contents, if necessary to establish it as a lost will.³ But, under the *statutes of New York*, it has been held that testamentary declarations made to an attorney, like other communications, are privileged, and that the executor or other representative of the deceased cannot waive the privilege or remove the seal of the statute.⁴ But under

such statutes, where the attorney signs the will as a witness, this is construed as an express waiver of the privilege by the testator.

1, *Russell v. Jackson*, 9 Hare 387; *Blackburn v. Crawfords*, 3 Wall. 775; *McCarthy's Will*, 55 Hun (N. Y.) 7, as to the sanity of the testator; *In re Wax's Estate*, 100 Cal. 343; *Doherty v. O'Callaghan*, 157 Mass. 90; 34 Am. St. Rep. 258 and note. See also, *Jennings v. Sturdevant*, 140 Ind. 641. But those communications which are not relevant are not privileged, *Sweet v. Owens*, 109 Mo. 1. See note, 17 L. R. A. 188.

2, *In re Layman's Will*, 40 Minn. 371. See also cases last cited.

3, *Graham v. O'Fallon*, 4 Mo. 338.

4, *Loder v. Whelpley*, 111 N. Y. 239; *Westover v. Attna Ins. Co.*, 99 N. Y. 56; 52 Am. Rep. 3; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Gurley v. Park*, 135 Ind. 440.

5, See next section.

§ 774. Waiver of the privilege.—From the very statement of the general rule of exclusion, it is obvious that the privilege is one which the client may waive by his consent, and such waiver may be either *express* or *implied*.¹ Thus, as we have seen, when the parties select the same attorney and make their communications in the presence of each other, each waives the privilege.² But, if the communications are made to several clients in matters in which they are all interested, the attorney cannot afterwards disclose such communications without the consent of all.³ When statements are made to his attorney by

one who has admitted his connection with a crime and testified against another as *an accomplice*, the privilege is waived; and such statements may be received, like other statements made out of court, to impeach the witness.⁴ Such privilege is waived, if the *client himself calls the attorney as a witness* in respect to such communications,⁵ or requests him to be a subscribing *witness to a will*, as this leaves the witness free to perform the duties of the position, and to testify to any matters in relation to the will and its execution of which he acquired knowledge, including the mental condition of the testator.⁶ The rule is the same, if the client testifies to conversations with his attorney in respect to the matters claimed to be privileged,⁷ or if the privileged communication is received in evidence *without objection*.⁸ It has even been held that the client waives the privilege by merely *becoming a witness in his own behalf* in respect to the other matters; that the cross-examination may then extend to conversations with his counsel which would otherwise be privileged.⁹ But the weight of authority and the better reasoning sustain the contrary view.¹⁰

1, See sec. 779 *infra*, where the rule as to the waiver of the privilege in the case of confidential communication between physician and patient is discussed. See also the cases cited below.

2, See sec. 770 *supra* and cases cited.

3, *Whiting v. Barney*, 38 Barb. (N. Y.) 393; *Root v. Wright*, 84 N. Y. 72; 38 Am. Rep. 495; *Chahoon v. Com.*,

21 Gratt. (Va.) 822; Robson v. Kemp, 4 Esp. 233; 5 *id.* 52; Strode v. Seaton, 2 Adol. & Ell. 171; McLeilan v. Longfellow, 32 Me. 494; 54 Am. Dec. 599; Bank of Utica v. Mersereau, 3 Barb. Ch. (N. Y.) 528; 49 Am. Dec. 189.

4, People v. Gallagher, 75 Mich. 512; Jones v. State, 65 Miss. 179. But see, Sutton v. State, 16 Tex. App. 490.

5, State v. Tall, 43 Minn. 273; Monaghan Bay Co. v. Dickson, 39 S. C. 146; 39 Am. St. Rep. 704; Alberti v. New York, L. E. & W. Ry. Co., 118 N. Y. 77.

6, McMaster v. Scriven, 85 Wis. 162; 39 Am. St. Rep. 828; *In re* Will of Coleman, 111 N. Y. 220; Daniel v. Daniel, 63 Pa. St. 191; Denning v. Butcher, (Iowa) 59 N. W. Rep. 69.

7, Passmore v. Passmore's Estate, 50 Mich. 626; 45 Am. Rep. 62; Oliver v. Pate, 43 Ind. 432; Hunt v. Blackburn, 128 U. S. 464.

8, Hoyt v. Hoyt, 112 N. Y. 513.

9, Inhabitants of Woburn v. Henshaw, 101 Mass. 200. In State v. Tall, 43 Minn. 273, it was held that a witness, not a party, might be asked if he had communicated to his attorney a fact as to which he had testified.

10, Duttonhofer v. State, 34 Ohio St. 91; 32 Am. Rep. 362; Bigler v. Reyher, 43 Ind. 112; Baker v. Kuhn, 38 Iowa 395; Hemenway v. Smith, 28 Vt. 701; Bobo v. Bryson, 21 Ark. 387; 76 Am. Dec. 406; State v. White, 19 Kan. 445; 27 Am. Rep. 137 and note.

§ 775. **Statutes on the subject.**—In several of the states, statutes have been enacted relating to this subject. Such statutes, however, are generally declaratory of the common law rule, and show no disposition to trench upon the ancient rule excluding communications made in the relation of attorney and client. Most of these statutes provide in substance that attorneys shall *not be allowed* to disclose

communications made to them by their clients, or advice given thereon in the course of professional employment, without the consent of their clients. In at least one state, an attorney who offers to testify in violation of the rule is guilty of a misdemeanor;¹ and in several of the states, the consent of the client, to be effectual as a waiver, must be at the trial. The detailed provisions of these statutes must, in each case, be sought in the statutes of the jurisdiction.

1, Tennessee, Code 1884 sec. 4750.

§ 776. Communications to clergymen.

Although the civil law did not compel the clergy to disclose secrets revealed to them at the confessional, and although this policy was often urged upon the English judges, yet the *common law recognized no privilege* in the case of confidential communications or confessions made to clergymen or other spiritual advisers.¹ In many states, however, *statutes* have extended the privilege to confessions made to a clergyman or priest in his professional character. Although these statutes differ somewhat, that of New York may be quoted to show their usual scope. It provides that: "A clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to

which he belongs." ² These statutes have seldom been construed in the courts, but it is evident that they are governed by the same general principles as in the case of privileged communications to attorneys and physicians. ³ As in the case of attorneys and physicians, there is no protection, unless the confession is made to one who is actually a clergyman or minister, and made to him *in his professional character*. ⁴

1, For a statement of the arguments for and against the common law rule, see, Whart. Ev. sec. 596; Greenl. Ev. sec. 247.

2, Rev. Stat. N. Y. sec. 833. See the statutes of the jurisdiction.

3, Many of the cases bearing upon this subject will be found collected in Hageman Priv. Com. ch. 15.

4, People v. Gates, 13 Wend. 311.

§ 777. Communications between physician and patient — Statutes.— Although there was no very good reason for the distinction at common law, no such privilege extended to communications with physicians as that which protected the confidence of attorney and client. ¹ Hence, *in the absence of statutes, physicians are compelled to disclose communications, if relevant, although made in confidence and in the course of professional employment.* The defect in the common law rule has been remedied by *statutes* in many states of this country; and there is consider-

able similarity in the statutes of different states.² Of course, the practitioner must consult the statutes of the jurisdiction. The *burden is upon the one objecting* to show that the relation of physician and patient existed;³ and where the physician is acting in the discharge of duties performed for some other person, the privilege does not arise, for example, if an examination is held at the instance of the adverse party,⁴ or by direction of the court to ascertain the physical or mental condition of the person for the purposes of the trial.⁵ But the *privilege arises if the physician actually treats the patient*, whether employed by him or by some other person.⁶ These statutes generally render physicians incompetent to testify as to such "*information*," acquired while attending the patient, as was necessary to enable him to prescribe or act,⁷ although, in some states, the statutes are less general in form, and only exclude "*communications*" made by the patient.⁸ The statutes generally provide that the privilege may be waived by the consent of the patient, although, in some states, the statutes contain no such clause. In those states where the statutes provide in substance that the physician cannot be examined as to any information gained in the course of his professional relation with the patient, it is immaterial whether such information is gained from the words or communications of the patient, or whether it is

the result of examination or observation, or derived from the statements of those who may surround the patient. "The secrets of the sick chamber cannot be revealed, because the patient was too sick to talk, or was temporarily deprived of his faculties by delirium or fever, or any other disease, or because the physician asked no questions. The statute seals the lips of the physician against divulging in a court of justice the intelligence which he acquired while in the necessary discharge of his professional duty."⁹ But he is a competent witness as to information or knowledge acquired by him while acting in *other than a professional capacity*, even though he has previously been called to treat the patient.¹⁰ On the same principle, the privilege extends, as in the case of attorneys, to the communications necessarily made to the *physician's assistants*.¹¹

1, *Mahoney v. Insurance Co.*, L. R. 6 C. P. 252; *R. v. Gibbons*, 1 Car. & P. 97. On this general subject, see extended note, 17 Am. St. Rep. 565-571; also articles, 5 Col. L. T. 181; 12 Med. Leg. Jour. 1, 125, 479.

2, California, Code Civ. Proc. sec. 1881; Colorado, Mills Ann. Stat. sec. 4824; Dakota, Rev. Stat. 1887 sec. 5313; Idaho, Rev. Stat. sec. 5958; Indiana, Rev. Stat. 1888 sec. 497; Iowa, McLean's Code sec. 4893; Kansas, Gen. Stat. 4418; Michigan, How. Stat. sec. 7516; Minnesota, Rev. Stat. 1891 sec. 5094; Missouri, Rev. Stat. 1889 sec. 8925; Montana, Rev. Stat. 1887 sec. 650; Nebraska, Con. Stat. 1891 sec. 4853; Nevada, Gen. Stat. sec. 3406; New York, Bliss Code sec. 834, laws 1892 ch. 514; Ohio, Rev. Stat. 1890 sec. 5241; Washington, Hill Stat. sec. 1649; Wisconsin, Rev. Stat. sec. 4075; Wyoming, Rev. Stat. sec. 2559.

A dentist is not, however, included under the term "surgeon," *People v. De France*, (Mich.) 62 N. W. Rep. 709.

3, *People v. Schuyler*, 106 N. Y. 298; *Bowles v. Kansas City*, 51 Mo. App. 416.

4, *People v. Sliney*, 137 N. Y. 570; *Nesbit v. People*, 19 Col. 441; *Freel v. Market St. Cable Ry. Co.*, 97 Cal. 40.

5, *People v. Kemmler*, 119 N. Y. 580; *People v. Sliney*, 137 N. Y. 570.

6, *People v. Schuyler*, 106 N. Y. 298, jail physician; *New York, C. & St. L. Ry. Co. v. Mushrush*, 11 Ind. App. 192; *Weits v. Mound City Ry. Co.*, 53 Mo. App. 39; *Freel v. Market St. Cable Ry. Co.*, 97 Cal. 40. The testimony of a partner of the attending physician was excluded in *Ætna Life Ins. Co. v. Deming*, 123 Ind. 384.

7, See the statutes cited above. In Wisconsin, a physician is not "compelled to disclose any information which he may have acquired in attending any patient in a professional character," Rev. Stat. sec. 4075. So in Arkansas, Rev. Stat. sec. 2862. A physician who was sent to ascertain the mental condition of a person is competent, however, *People v. Kemmler*, 119 N. Y. 580.

8, *Indiana*, Rev. Stat. 1888 sec. 497; *Iowa*, *McLean's Code* 1888 sec. 4893.

9, *Edington v. Mutual L. Ins. Co.*, 5 Hun (N. Y.) 1; *Heuston v. Simpson*, 115 Ind. 62; 7 Am. St. Rep. 409; *Pennsylvania Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Carthage T. P. Co. v. Andrews*, 102 Ind. 138; 52 Am. Rep. 653; *Connecticut L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617; *Prader v. National Assn.*, (Iowa) 63 N. W. Rep. 601; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Gartside v. Connecticut Mut. L. Ins. Co.*, 76 Mo. 446; 43 Am. Rep. 765; *Kling v. Kansas City*, 27 Mo. App. 231; *Cooley v. Foltz*, 85 Mich. 47. Statement made to a physician as to circumstances of an accident were held privileged in *Pennsylvania Co. v. Marion*, 123 Ind. 415. Contra, *Birmingham Ry. Co. v. Hale*, 90 Ala. 8; 24 Am. St. Rep. 748.

10, Fisher v. Fisher, 129 N. Y. 654.

11, Renihan v. Dennin, 103 N. Y. 573; 57 Am. Rep. 770; *Ætna Ins. Co. v. Deming*, 123 Ind. 384. See sec. 769 *supra*. But this rule does not apply to an attendant in an ambulance, *Springer v. Byram*, 137 Ind. 15.

§ 778. **Confined to information gained in the performance of professional duty.** Nearly all of the statutes on this subject require that the statements of the patient, in order to be privileged, should be necessary for the performance of the professional duty, although the mode of expressing such requirement varies in the different states,¹ and the *fact* that the statements are necessary *may be inferred* from the circumstances without formal proof.² These statutes have frequently been construed; and it has been held that communications or *advice relating to the procuring* of an expected abortion or other *crime* are not "necessary," within the meaning of the statute, and are not privileged.³ When a patient makes admissions to his physician in respect to the time at which an alleged injury was received, such statements may be received, unless it appears that they were necessary to obtain professional advice or treatment.⁴ On the same principle, it has been held that a physician who had attended a woman in confinement might disclose her statement to him that she was not married,⁵ as well as such *other statements, not necessary to the performance of his duty*, as have no

reference to the condition of the patient.⁶ The physician may also testify to any knowledge obtained from personal acquaintance with the deceased, either before or after the relationship of physician and patient began,⁷ or to the simple fact that he has treated or attended the patient, and as to the number of his visits.⁸

1, See the statutes already cited. See also, *People v. Schuyler*, 106 N. Y. 298, as to the testimony of a physician who attended prisoners in jail.

2, *Grattan v. Metropolitan Life Ins. Co.*, 80 N. Y. 281; 36 Am. Rep. 617.

3, *Hewett v. Prime*, 21 Wend. 79. But the rule is otherwise where the communication is not for an unlawful purpose, as in case of a miscarriage to save life, *Guptill v. Verback*, 58 Iowa 98. See also, *People v. Brower*, 53 Hun (N. Y.) 217.

4, *Campau v. North*, 39 Mich. 606; 33 Am. Rep. 433; *Brown v. Rome, W. & O. Ry. Co.*, 45 Hun (N. Y.) 439; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564; *Kansas City, Ft. S. & M. Ry. Co. v. Murray*, 55 Kan. 336. But see, *Pennsylvania Ry. Co. v. Marion*, 123 Ind. 415.

5, *Collins v. Mack*, 31 Ark. 684.

6, *Collins v. Mack*, 31 Ark. 684; *Brown v. Metropolitan Ins. Co.*, 65 Mich. 306.

7, *Fisher v. Fisher*, 129 N. Y. 654; *Hoyt v. Hoyt*, 112 N. Y. 515.

8, *Dittrich v. Detroit*, 98 Mich. 245; *Patten v. United Life & Acc. Ins. Assn.*, 133 N. Y. 450; *Bresienmeister v. Supreme Lodge*, 81 Mich. 525, as to the number of visits.

§ 779. Waiver of the privilege.—As we have seen, statutes generally provide that the

information shall not be disclosed without the consent of the patient. The privilege is for his protection, and, if he sees fit, he may waive it either by express consent or by calling the physician to testify as to the privileged matter,¹ or by failing to object to such testimony as incompetent under the statute.² It has been held that, when the privilege has once been waived and the testimony made public, it is waived for all time.³ It has also been held that the privilege may be waived, although the statute makes no provision for such waiver.⁴ The rule has prevailed in New York and Indiana that the question of privilege may be raised by any party to the action, unless waived by the patient himself, and that the *representatives of the deceased* can not waive the seal of the statutes. It was conceded in New York that this rule often excluded evidence of great importance in insurance and testamentary cases, but the court held the statute to be imperative.⁵ By the weight of authority, however, it is held that, since the patient may waive the privilege for the purpose of protecting his rights, the same waiver may be made by those who represent him after his death, for the purpose of protecting rights acquired by him.⁶ But it has been held, in some states, that this privilege can not be waived by the heirs, as the right of waiver belongs to the personal representative alone.⁷ In case an infant is a party, the

privilege may be waived by the parent of such minor child.⁸ The statutes generally apply to *criminal*, as well as to civil actions; and the accused may claim, as privileged, communications made by him to his physician in the course of professional employment.⁹ But in New York, in actions for murder, it was held that the defendant could not invoke the privilege to exclude the testimony of the physician who attended the victim, as to his condition before death. It was the opinion of the court that the object of the statute is "to protect the patient, and not to shield one who is charged with his murder, and that, in such case, the statute is not to be so construed as to be used as a weapon of defense to the party so charged, instead of a protection to his victim."¹⁰ The privilege under these statutes is frequently claimed in *life insurance cases*. It has sometimes been objected that the rule, as applied in some states in life insurance cases, shuts out the most satisfactory evidence of the existence of disease and of the cause of death. But, although such considerations may have weight so far as the policy of legislation is concerned, they can not control the interpretation of the statutes where the words are not ambiguous.¹¹ The privilege may, however, be waived when the contract of insurance is made,¹² or by inserting the statement of the physician in the proof of death.¹³

1, *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358; *Carrington v. St. Louis*, 89 Mo. 212; *Morris v. Morris*, 119 Ind. 341; *Alberti v. New York, L. E. & W. Ry. Co.*, 118 N. Y. 77; *Pennsylvania M. L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Grand Rapids Ry. Co. v. Martin*, 41 Mich. 667; *McKinney v. Grand St. Ry. Co.*, 104 N. Y. 352. But the calling of one of two physicians who attended a party does not waive the privilege as to the other, *Mellor v. Missouri Pac. Ry. Co.*, 105 Mo. 455. See note, 17 Am. St. Rep. 570.

2, *Hoyt v. Hoyt*, 112 N. Y. 493; *Lincoln v. Detroit*, 101 Mich. 245; *State v. Depoister*, 21 Nev. 107.

3, *McKinney v. Grand St. Ry. Co.*, 104 N. Y. 352, where testimony was admitted on the second trial against the patient which he himself had offered on a former trial. The contrary rule was held in *Briesenmeister v. Supreme Lodge*, 81 Mich. 525.

4, *Carrington v. City of St. Louis*, 89 Mo. 208; *Grand Rapids Ry. Co. v. Martin*, 41 Mich. 667.

5, *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56; 52 Am. Rep. 1; *Renihan v. Dennin*, 103 N. Y. 573; 57 Am. Rep. 770; *Loder v. Whelpley*, 111 N. Y. 239; *Heuston v. Simpson*, 115 Ind. 62; 7 Am. St. Rep. 409. But now by statute in New York, the representatives of deceased patients may waive the privilege except as to the confidential communications, and as to such facts as would tend to disgrace his memory, New York Laws 1892 ch. 514.

6, *Thompson v. Ish*, 99 Mo. 160; 17 Am. St. Rep. 552; *Pennsylvania M. L. Ins. Co. v. Wiler*, 100 Ind. 92; 50 Am. Rep. 769; *Morris v. Morris*, 119 Ind. 341. administrator with will annexed; *Fraser v. Jennison*, 42 Mich. 206, proponents of a will; *Groll v. Tower*, 85 Mo. 249; 55 Am. Rep. 358; *Masonic M. B. Assn. v. Beck*, 77 Ind. 203; 40 Am. Rep. 295, beneficiaries in an insurance policy.

7, *Gurley v. Park*, 135 Ind. 440; *Flint's Estate*, 100 Cal. 391.

8, *State v. Depoister*, 21 Nev. 107.

9, *People v. Murphy*, 101 N. Y. 126; 54 Am. Rep. 661;

People v. Schuyler, 106 N. Y. 298; *People v. Lane*, 101 Cal. 513.

10, *Pierson v. People*, 79 N. Y. 424; 35 Am. Rep. 530, case of murder by poison; *People v. Harris*, 136 N. Y. 423.

11, *Connecticut L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274; 44 Am. Rep. 372; *Buffalo L. & T. Co. v. Knights Templar Assn.*, 126 N. Y. 450; 22 Am. St. Rep. 839.

12, *Adreveno v. Mutual Reserve Assn.*, 34 Fed. Rep. 870.

13, *Buffalo L. & T. Co. v. Knights Templar Assn.*, 126 N. Y. 450; 22 Am. St. Rep. 839. *Contra*, *Derier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670.

1780. Privileged communications—Affairs of state.—"No one can be compelled to give evidence relating to any affairs of state, or as to official communications between public officers upon public affairs, except with the permission of the officer at the head of the department concerned."¹ Thus, it has been held that testimony can not be received in order to prove a contract with the president of the United States during the civil war, by the terms of which secret services were to be rendered in giving information respecting the resources and movements of the enemy, and that no action on such a contract could be maintained.² On the same principle, the heads of the departments of national or state governments cannot be compelled to produce letters or documents as evidence, when, in their judgment, such production would be prejudicial to the

public service.³ Nor can disclosure of communications between the heads of the departments of state and their subordinate officers be compelled.⁴ In an English case, it was held that, in the first instance, the question is to be determined by the officer at the head of the department, and that, unless he submits the question to the court, the disclosure will not be compelled by the court, unless there is very conclusive evidence that it would not be prejudicial to the public service.⁵ In England, the privilege also extends to the debates and the proceedings of parliament.⁶ The law recognizes the duty of every citizen to communicate to the government and to its officers such information as he may have concerning the commission of offenses against the laws; and for the purpose of encouraging the performance of that duty without fear of consequences, the courts have long held that, when the government is immediately concerned, a witness cannot be compelled to disclose the names of persons by whom and to whom information has been given which led to the discovery of the offense. Thus, in revenue cases, a witness is not compelled to disclose the name of the informer,⁷ or to state whether he himself was the informer.⁸ The same rule has been applied in cases of treason,⁹ counterfeiting,¹⁰ larceny,¹¹ and in actions for libel based upon communications sent to public officers, charging the plaintiff

with misconduct in office or with offenses against the law.¹²

1, Steph. Ev. art. 112; *Beatson v. Skene*, 5 Hurl. & N. 338.

2, *Totten v. United States*, 92 U. S. 105.

3, *Home v. Bentinck*, 2 Brod. & B. 130; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255; *Beatson v. Skene*, 5 Hurl. & N. 838; *Earl v. Vass*, 1 Shaw 229; *Gray v. Pentland*, 2 Serg. & R. (Pa.) 23; *Worthington v. Scribner*, 109 Mass. 487; 12 Am. Rep. 736. In like cases, secondary evidence will not be received of such papers, *Gray v. Pentland*, 2 Serg. & R. (Pa.) 23.

4, *Wyatt v. Gore*, Holt 299, communications between the governor of a province and his attorney-general; *Anderson v. Hamilton*, 2 Brod. & B. 156 n., between an agent of government and secretary of state; *United States v. Six Lots*, 1 Wood (U. S.) 234, between a United States district-attorney and the attorney-general.

5, *Beatson v. Skene*, 5 Hurl. & N. 838.

6, *Plunkett v. Cobbett*, 5 Esq. 137; Steph. Ev. art. 112. As to proceedings of the United States senate in executive session, see, *Law v. Scott*, 5 Har. & J. (Md.) 438.

7, *R. v. Akers*, 6 Esp. 125.

8, *Attorney-General v. Briant*, 15 M. & W. 169.

9, *R. v. Hardy*, 24 How. St. Tr. 199, 753, 816, 823; *R. v. Watson*, 32 How. St. Tr. 1, 102, 105; 2 Stark. 116, 136.

10, *United States v. Moses*, 4 Wash. (U. S.) 726.

11, *State v. Soper*, 16 Me. 293.

12, *Gray v. Pentland*, 2 Serg. & R. (Pa.) 23; *Earl v. Vass*, 1 Shaw 229; *Home v. Bentinck*, 2 Brod. & B. 130; *Robinson v. May*, 2 Smith 3; *Worthington v. Scribner*, 109 Mass. 487; 12 Am. Rep. 736, reviewing many cases.

1781. Arbitrators privileged.—Partly because the law looks with favor on the end

of litigation, and partly because of the inconvenience which would follow if arbitrators and judges could be called generally as witnesses, the privilege extends to them: Thus, an arbitrator cannot be called to contradict or *impeach the award* or to show that it should be construed to mean what, on its face, it does not purport to mean;¹ or that he did not in fact agree to the award;² or that he or his associates were guilty of misconduct;³ or to state the grounds of the award,⁴ or to show that the award had been misconstrued or signed without reading, or to otherwise impeach it, except for fraud.⁵ But it may be shown by arbitrators that questions over which they have no jurisdiction had been entertained;⁶ or that a given claim was or was not included in their award, or taken into consideration by the arbitrators;⁷ or what matters were actually submitted to and considered by them, when this becomes relevant,⁸ or that the award had never been consummated or delivered.⁹ The testimony of arbitrators has been received as to other collateral matters, for example, the statements and acts of the parties during the trial or reference.¹⁰

1, *Doke v. James*, 4 N. Y. 568; *Fidler v. Cooper*, 19 Wend. 285; *Dater v. Wellington*, 1 Hill 319; *Packard v. Reynolds*, 100 Mass. 153.

2, *Campbell v. Western*, 3 Paige (N. Y.) 124.

3, *Claycomb v. Butler*, 36 Ill. 100.

4, Withington v. Warren, 10 Met. 431.

5, Johnson v. Durant, 4 Car. & P. 327; 2 Barn. & Adol. 925; Ellis v. Saltan, 4 Car. & P. 327 note a; Withington v. Warren, 10 Met. 431; Packard v. Reynolds, 100 Mass. 153; Ellison v. Weathers, 78 Mo. 115.

6, Buccleugh v. Met. Board, L. R. 3 Ex. 306; 5 Ex. 234.

7, Hale v. Huse, 10 Gray 99; Mayor v. Butler, 1 Barb (N. Y.) 325.

8, Hale v. Huse, 10 Gray 99 Thrasher v. Overly, 51 Ga. 91; Hail v. Vamer, 6 Neb. 85; Cady v. Walker, 62 Mich. 157; Duke of Buccleugh v. Board of Works, L. R. 5 H. L. Cas. 418; 2 Eng. Rep. 448.

9, Shulte v. Hennessey, 40 Iowa 352.

10, Martin v. Thornton, 4 Esp. 180; Calvert v. Friebus, 48 Md. 44; Graham v. Graham, 9 Pa. St. 254; 49 Am. Dec. 557.

§ 782. **Judges privileged.**— It has sometimes happened that a presiding judge or magistrate has temporarily left the bench to assume the role of witness in the pending cause. But the two functions are so inconsistent that the practice is obviously improper.¹ Among the objections which may be mentioned to such a practice are the following: That the judge has, to some extent, to pass upon the competency and weight of his own testimony, and that the jury may find difficulty in discriminating between those statements of the judge which are in the nature of evidence and those which are in the nature of instructions. Although it has been held that a *court composed of several judges* or magistrates does not lose jurisdiction be-

cause one of its members testifies in the action, yet, if proper objection is taken, the judgment will be set aside.¹ For still stronger reasons, a *single presiding judge*, magistrate or referee cannot properly be a witness in a cause pending before him.² It has, however, been held that a judge may waive the privilege and testify to the *facts* which transpired before him *at a former trial*;³ and judges and justices of the peace have been called to prove what witnesses have sworn to before them at a former trial. While their notes are not evidence, such notes may be used to refresh their memory.⁴ For very obvious reasons, judges are not compelled to state the *reasons for their decisions* nor to give evidence as to that which transpires in the *consultation room*;⁵ and "it is doubtful whether a judge is compellable to testify as to anything which came to his knowledge in court as such judge."⁶

1, Instances of this are given in *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349.

2, *People v. Dohring*, 59 N. Y. 374; 17 Am. Rep. 349. In the opinion of Mr. Taylor, under the English rule, one of several judges may be a witness, if he leaves the bench and take no further judicial part in the trial, *Tayl. Ev. sec. 1379*.

3, *McMillan v. Andrews*, 10 Ohio St. 112; *Morss v. Morss*, 11 Barb. (N. Y.) 510; *People v. Miller*, 2 Park. Cr. (N. Y.) 197; *Dabney v. Mitchell*, 66 Ala. 465; *Baker v. Thompson*, 89 Ga. 486; *Rogers v. State*, 60 Ark. 76.

4, *Martin v. Thornton*, 4 Esp. 180; *Taylor v. Larkin*, 12 Mo. 103; 49 Am. Dec. 119, testimony of a justice of the

peace as to the grounds of his decision. See also, *Welcome v. Batchelder*, 23 Me. 85. On appeal, a probate judge was allowed to testify that, when the cause was before him, he had no interest therein, *Sigourney v. Sibley*, 21 Pick. 101; 32 Am. Dec. 248.

5, *Huff v. Bennett*, 4 Sand. (N. Y.) 120; *Zitske v. Goldberg*, 38 Wis. 216.

6, Whart. Ev. sec. 600.

7, Steph. Ev. art. 111; *R. v. Gazard*, 8 Car. & P. 595.

§783. Privilege as to transactions in the jury room — Grand jurors.— At common law and in most of the states, the oath administered to grand jurors binds them to preserve inviolate the secrets of the jury room;¹ and on this ground, as well as on other grounds of public policy, it was the common law rule, quite strictly enforced, that the *proceedings of grand jurors* were *privileged*, and could not be made public.² Accordingly, it was formerly held that grand jurors could not be asked to state the testimony of a witness given before them, for the purpose of impeaching him at the trial.³ But it is now generally held in this country that a grand juror may be called to show that the *statements of a witness* on the trial are in contradiction to those made by him before the grand jury.⁴ Nor can one, charged with committing perjury, shield himself by the claim that the transactions of the grand jury room are inviolate.⁵ As further illustrations of the same subject, grand jurors have been

allowed to swear to the *statements of the accused* made before them,⁶ to the *suspicious conduct of a witness*⁷ and to the fact that certain witnesses were or were not examined before them.⁸ Although, as we have seen, the ancient rule has been much relaxed, it is still held contrary to public policy to allow members of the grand jury to testify in any collateral proceeding to such facts as the opinions or statements of the other jurors during the consultations, or to impeach their finding, or to prove that some of the witnesses were not duly sworn, or that the indictment was not concurred in or not founded upon sufficient evidence.⁹ It is held by the weight of authority that, even in a direct proceeding *on a motion to set aside the indictment*, it cannot be shown by the testimony of the jurors that the indictment was not voted for by a sufficient number of the jury.¹⁰ But the contrary view also has the support of very high authority.¹¹

1, In some states this is not the form of oath, Arkansas, Dig. Stat. sec. 2075; Illinois, Starr & C. Stat. 1885 p. 1425 sec. 18; Iowa, McLean's Stat. sec. 5651; Kansas, Gen. Stat. 1889 sec. 5140; Kentucky, Gen. Stat. 1881 p. 570 sec. 6; Nevada, Comp. L. 1885 sec. 4073; Virginia, Code 1887 sec. 3980; West Virginia, Rev. Stat. 1891 p. 957. See article on grand jurors as witnesses in 12 Crim. L. Mag. 583.

2, Owens v. Owens, 81 Md. 518; State v. Fassett, 16 Conn. 457; Greenl. Ev. sec. 252; Best Ev. sec. 579. This privilege extends to all who are necessarily aiding the grand jury, as, for example, the state's attorney, McClellan v. Richardson, 1 Shep. (Me.) 82.

3, *Inlay v. Rogers*, 7 N. J. L. 347; 12 Vin. Abr. 20 tit. Evidence.

4, *Com. v. Mead*, 12 Gray 167; 71 Am. Dec. 741; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *State v. Wood*, 53 N. H. 484; *People v. Hulbut*, 4 Den. 133; 47 Am. Dec. 244; *United States v. Reed*, 2 Blatch. (U. S.) 435; *State v. Benner*, 64 Me. 267; *Clanton v. State*, 13 Tex. App. 139; *Gordon v. Com.*, 92 Pa. St. 216; 37 Am. Rep. 672. The practitioner should consult the statutes of the jurisdiction as, in many states, there are statutes on the subject. In a few cases, such evidence has been allowed to confirm a witness, *Perkins v. State*, 4 Ind. 222; *People v. Hulbut*, 4 Den. 133; 47 Am. Dec. 244.

5, *State v. Broughton*, 7 Ired. (N. C.) 96; 45 Am. Dec. 507; *State v. Fassett*, 16 Conn. 457; *Jones v. Turpin*, 6 Heisk. (Tenn.) 181; *People v. Hulbut*, 4 Den. 133; 47 Am. Dec. 244; *People v. Young*, 31 Cal. 563.

6, *United States v. Porter*, 2 Cranch C. C. 60; *United States v. Charles*, 2 Cranch C. C. 76.

7, *State v. Broughton*, 7 Ired. (N. C.) 96; 45 Am. Dec. 507.

8, *Com. v. Hill*, 11 Cush. 137.

9, *State v. Broughton*, 7 Ired. (N. C.) 96; 45 Am. Dec. 507; *State v. Baltimore Ry. Co.*, 15 W. Va. 362; *Gordon v. Com.*, 92 Pa. St. 216; 37 Am. Rep. 672; *People v. Hurlbut*, 4 Den. 133; 47 Am. Dec. 244; *State v. Fassett*, 16 Conn. 457; *State v. Baker*, 20 Mo. 338; *State v. Oxford*, 30 Tex. 428. But see, *R. v. Marsh*, 6 Adol. & Ell. 236. This rule has been declared by statutes in some states, Kansas, Gen. Stat. 1889 sec. 5158; Maine, Rev. Stat. 1883 ch. 134 sec. 8; Massachusetts, Gen. Stat. 1882 ch. 213 sec. 12; Michigan, Comp. L. 1882 sec. 9501; Minnesota, Rev. Stat. 1891 sec. 6704; Nebraska, C. Laws 1891 secs. 6033-4; Nevada, Comp. Laws 1885 sec. 4095; Ohio, Rev. Stat. 1880 sec. 7205; Utah, Laws 1888 sec. 4923; Wisconsin, Rev. Stat. 1878 sec. 2554.

10, *R. v. Marsh*, 6 Adol. & Ell. 236; *State v. Baker*, 20 Mo. 338; *State v. Oxford*, 30 Tex. 428.

11, Low's Case, 4 Me. 439; 16 Am. Dec. 271; Com. v. Smith, 9 Mass. 107. On this subject generally, see note, 16 Am. Dec. 281.

§784. Same — Petit jurors — When juror may be witness.— It is a familiar rule that, in the jury room, one juror has no right to communicate to the others facts material to the issue, and as to which testimony might have been properly given. If a juror is to be a witness, he should be sworn and examined as other witnesses.¹ Although the cases just cited show that there are precedents which sustain the practice of allowing a person to act in the dual capacity of juror and witness, it is an event which very rarely happens, and the same considerations which forbid a judge to pass upon the weight of his own testimony would seem to preclude a juror from testifying as to the controverted facts in the pending case.² Petit or traverse jurors may, in a subsequent action, testify to *facts occurring at the former trial*, if relevant, for example, as to the statements of witnesses, or what claims were allowed by the jury;³ and if the foreman of the jury announces the verdict erroneously, this may be shown by the evidence of the jurors.⁴ So their evidence or affidavits may be received to show the *misconduct* of the *bailiff* in the jury room,⁵ or the misconduct of the *parties* or their agents in attempting to influence the jury.⁶ Their affidavits are admissible to show

that they did not read papers that came before them by accident and which, though not competent, might have influenced them, if they had been read.⁷ But, in general, the testimony or affidavits of petit jurors will not be received as to their *deliberations in the jury room*. Thus, the evidence of a juror is inadmissible to show that some of the jury did not in fact concur in the verdict,⁸ or did not understand it,⁹ or to show the charge of the court or the law applicable to the case;¹⁰ or that a juror consented to the verdict because compelled by poor health to escape confinement;¹¹ or that jurors were influenced by improper facts or by information improperly obtained during the deliberations of the jury,¹² or that the verdict was arrived at by lot or by some other improper mode.¹³ It is essential to the due administration of justice that jurors should understand that their *deliberations in the jury room are inviolable*, and that the reasons for their verdict cannot be questioned.¹⁴

1, *R. v. Rosser*, 7 Car. & P. 648; *R. v. Sutton*, 4 Maule & S. 532; *Anderson v. Barnes*, 1 N. J. L. 203; *Wood River Bank v. Dodge*, 36 Neb. 708. See also, *Woolfolk v. State*, 85 Ga. 69. As to jurors as witnesses, see article, 45 Alb. L. Jour. 371.

2, Sec cases last cited.

3, *Piatt v. St. Clair*, 6 Ohio 227.

4, *Cogan v. Ebdon*, 1 Burr. 383; *Roberts v. Hughes*, 7 M. & W. 399; *Jackson v. Dickenson*, 15 Johns. 309; 8 Am. Dec. 236; *Dalrymple v. Williams*, 63 N. Y. 361; 20 Am.

Rep. 544; Prussell v. Knowles, 5 Miss. 90; Capen v. Stoughton, 16 Gray 367.

5, Nelms v. State, 21 Miss. 500; 53 Am. Dec. 94; Wiggins v. Downer, 67 How. Pr. (N. Y.) 65. But see, Doran v. Shaw, 3 T. B. Mon. (Ky.) 411.

6, Chews v. Driver, 1 N. J. L. 166; Reynolds v. Champlain Trans. Co., 9 How. Pr. (N. Y.) 7; Ritchie v. Holbrook, 7 Serg. & R. (Pa.) 458; Woodward v. Leavitt, 107 Mass. 453.

7, Hix v. Drury, 5 Pick. 296, 302. See sec. 713, *supra*.

8, Reaves v. Moody, 15 Rich. L. (S. C.) 312; Boetge v. Landa, 22 Tex. 105; Cochran v. Street, 1 Wash. (Va.) 79; Cire v. Righton, 11 La. 140; Thomas v. Jones, 28 Gratt. (Va.) 383; Johnson v. Davenport, 3 J. J. Marsh. (Ky.) 390; Hester v. State, 17 Ga. 146; Garretty v. Brazell, 34 Iowa 100.

9, Jackson v. Williamson, 2 T. R. 281; Folsom v. Brown, 25 N. H. 114.

10, Saunders v. Fuller, 4 Humph. (Tenn.) 516; State v. Millican, 15 La. An. 557.

11, Scott v. State, 7 Lea (Tenn.) 232.

12, Clum v. Smith, 5 Hill 560; Price v. Warren, 1 Hen. & M. (Va.) 385; Whitney v. Whitman, 5 Mass. 405; State v. Hascall, 6 N. H. 352, 361; Johnson v. Parrotte, 34 Neb. 26.

13, Owen v. Warburton, 1 N. R. 326; Tucker v. South Kensington, 5 R. I. 558; Moses v. Central Park Ry. Co., 23 N. Y. S. 23; Vasie v. Delaval, 1 T. R. 11; Straker v. Graham, 4 M. & W. 721; Burges v. Langley, 6 Scott N. R. 518; State v. Doon, R. M. Charlt. (Ga.) 1; Pleasants v. Heard, 15 Ark. 403; Sawyer v. Hannibal Ry. Co., 37 Mo. 240; Dana v. Tucker, 4 Johns. 487; Heath v. Conway, 1 Bibb (Ky.) 398; Haun v. Wilson, 28 Ind. 296.

14, Woodward v. Leavitt, 107 Mass. 453; Heffron v. Gallupe, 55 Me. 563.

1785. Evidence showing misconduct of jurors.—The cases already cited illus-

trate that the courts adhere with considerable strictness to the rule that the testimony of the jurors will not be received to show their own mistake or misconduct, or that of their fellows while in the jury room, or otherwise to impeach their verdict. The following reasons have been assigned for rejecting evidence or affidavits of this character: "(1), Because they would tend to defeat their own solemn acts under oath; (2), Because their admissions would open a door to tamper with jurymen after they have given their verdict; (3), Because they would be the means in the hands of a dissatisfied juror to destroy a verdict at any time after he had assented to it."¹ There are, however, a few *states in which a different rule prevails*, and in which, under certain limitations, the affidavits or testimony of jurors may be received to show misconduct in the jury room, or to show that the verdict was arrived at by lot or by aggregation and average. In Iowa, the subject has frequently been discussed; and it has been held that the affidavits of jurors may be received to show any matter occurring during the trial or in the jury room, *which does not essentially inhere in the verdict itself*, as that a jury was improperly approached by interested parties or their agents; that witnesses or others conversed concerning the case in the presence of the jurors; that the verdict was obtained by average or lot, or other improper

manner. But such affidavits can not be received to show that the juror did not assent to the verdict; that he misunderstood the instructions of the court, the statements of witnesses or the pleadings in the case, or that he was unduly influenced by the statements of his fellow jurors, or mistaken in his calculations of judgment or other matter resting in the juror's breast.¹ It is generally held that *when the conduct of the jury is assailed*, their affidavits or testimony may be received *in support of their verdict*, and to show that they have been guilty of no misconduct for which their verdict should be set aside.²

1, 3 Grah. & Wat. New Trials 1428; Woodward v. Leavitt, 107 Mass. 453; 9 Am. Rep. 49; an extended review of the authorities. See also note, 24 Am. Dec. 478.

2, Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195, citing other Iowa cases; State v. Cowan, 74 Iowa 53. A similar rule has been adopted in other states, see, Perry v. Bailey, 12 Kan. 539; Polhemus v. Heiman, 50 Cal. 438, by statute; Fain v. Goodwin, 35 Ark. 109, by statute; Anschicks v. State, 6 Tex. App. 524, by statute; Galvin v. State, 6 Coldw. (Tenn.) 283.

3, State v. Dumphey, 4 Minn. 438; Hix v. Drury, 5 Pick. 296; Taylor v. Greeley, 3 Me. 204; People v. Hunt, 59 Cal. 430; Dana v. Tucker, 4 Johns. 487; Peck v. Brewer, 48 Ill. 54; Harding v. Whitney, 40 Ind. 379; State v. Underwood, 57 Mo. 40; State v. Ayer, 23 N. H. 301; Hutchinson v. Consumers Coal Co., 36 N. J. L. 24; Farrer v. State, 2 Ohio St. 54; Gilleland v. State, 44 Tex. 356; Downer v. Baxter, 30 Vt. 467; State v. Dolling, 37 Wis. 396; Woodward v. Leavitt, 107 Mass. 453; 9 Am. Rep. 49, where many cases are reviewed; McCorkle v. Binns, 5 Binn. (Pa.) 340.

§ 786. **Accomplices.**—An accomplice is one who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime.¹ Even when the rule prevailed in England that persons interested in the result were incompetent witnesses, it was held that, in order to prevent a failure of justice, and from the necessity of the case, *testimony of accomplices* should be *admitted*, unless they were parties to the record.² Of course, if an accomplice had been already *convicted of an infamous crime*, he was incompetent under the common law rule, unless the incompetency was removed by pardon or in some other manner.³ So if an accomplice was *jointly indicted* and put upon his trial at the same time with another defendant, he was incompetent, until a dismissal as to him, or until, on a separate verdict being rendered, he had been acquitted, or, if convicted, had paid the fine.⁴ In the later discussions, a still more liberal rule is laid down by the courts. They hold that, as soon as a *separate trial* has been ordered for any co-defendant or accomplice, he is a competent witness in the trial of the others.⁵

1, *People v. Bolanger*, 71 Cal. 20; 4 Bl. Com. 35. For a general discussion of the testimony of accomplices, see notes, 86 Am. Dec. 329; 71 Am. Dec. 671-678; also article, 8 Crim. L. Mag. 1.

2, *Jones v. Georgia*, 1 Kelly 610; *Noland v. State*, 19 Ohio 131; *People v. Whipple*, 9 Cow. 707; *People v. Costello*, 1 Den. 83; *State v. Shields*, 45 Conn. 256; *Gray v. People*, 26

Ill. 344; Earl v. People, 73 Ill. 329; Ayers v. State, 88 Ind. 275; State v. Cook, 20 La. An. 145; Territory v. Corbet, 3 Mont. 50; United States v. Lancaster, 2 McLean (U. S.) 431; United States v. Troax, 3 McLean (U. S.) 224; United States v. Henry, 4 Wash. (U. S.) 428.

3, See sec. 734 *supra*.

4, R. v. Fletcher, 1 Strange 633; Lindsay v. People, 63 N. Y. 143; Wakely v. Hart, 6 Binn. (Pa.) 316; State v. Steifel, 106 Mo. 129; Child v. Chamberlain, 6 Car. & P. 213; State v. Minor, 11 Mo. 302. When one is made a co-defendant for the purpose of depriving others of his testimony, the court will generally direct his dismissal, so that he may be allowed to testify, Beasley v. Beasley, 2 Swan (Tenn.) 180; Cochran v. Ammon, 16 Ill. 316. When there is no evidence against a co-defendant, the court will allow him to testify, State v. Shaw, 1 Root (Conn.) 134; Cochran v. Ammon, 16 Ill. 316.

5, Smith v. Com., 90 Va. 759; State v. Bogue, 52 Kan. 79; State v. Barrows, 76 Me. 401; Benson v. United States, 146 U. S. 325; McGinnis v. State, (Wy.) 31 Pac. Rep. 978; Richards v. State, 91 Tenn. 923; Allen v. State, 10 Ohio St. 287; Carroll v. State, 5 Neb. 31, effect of statutes; State v. Thaden, 43 Minn. 325; State v. Umble, 115 Mo. 452. The prosecution may refer in the argument to the fact that the defendant has not called the co-defendant as he had a right to do, State v. Mathews, 98 Mo. 125.

§ 787. Same — Credibility. — *Statutes giving parties or persons interested in the result the right to testify do not affect the degree of credit to be given to the testimony of accomplices.*¹ Since the testimony of accomplices is competent, and since the jury are to judge of the credibility of witnesses, it logically follows that a defendant may be convicted upon the unsupported evidence of an accomplice. If the jury so act upon such testimony, the

verdict will not be set aside. But owing to the fact that witnesses of this character are often subjected to strong temptation to shift the burden of guilt upon the defendant, it has long been a rule of *practice* in criminal trials *for the court to charge the jury that they should not convict the prisoner upon the uncorroborated testimony of an accomplice.*¹ But although it might ordinarily be regarded as an omission of duty for the judge to neglect to so instruct the jury, yet the decisions are to the effect that his refusal so to do is not reversible error, as the matter lies in the *discretion* of the judge. The instruction relates, however, to the value or weight of the testimony, and does not withdraw the case from the jury.² The questions of fact are for their determination.³

1, *Earl v. People*, 73 Ill. 329; *Atwood's Case*, 1 Leach Cr. C. 464; *Jones' Case*, 2 Camp. 132; *Johnson v. State*, 65 Ind. 269; *State v. Potter*, 42 Vt. 495; *People v. Costello*, 1 Den. 83; *State v. Stebbins*, 29 Conn. 463; *R. v. Hastings*, 7 Car. & P. 152; *Com. v. Holmes*, 127 Mass. 424, where there is an exhaustive review of the authorities, especially those of Massachusetts; *New York, G. & I. Co. v. Gleason*, 78 N. Y. 511; *Lindsay v. People*, 63 N. Y. 154; *Finley v. Hunt*, 56 Miss. 221; *Mack v. State*, 48 Wis. 271; *Jenkins v. State*, 31 Fla. 196. Under state statutes, this rule was applied to misdemeanors alone in Alabama, *Moses v. State*, 58 Ala. 117. Some courts hold the testimony of an accomplice competent, but require still further testimony to convict the accused, *State v. Cook*, 20 La. An. 145; *Ray v. State*, 1 G. Greene (Iowa) 316; 48 Am. Dec. 379; *State v. Odell*, 8 Ore. 30.

2, *R. v. Stubbs*, 33 Eng. L. & Eq. 552; *R. v. Boyes*, 1 Best & Smith 311, 320; *State v. Williamson*, 42 Conn. 261;

Johnson v. State, 65 Ind. 269; People v. Doyle, 21 N. Y. 579; State v. Watson, 31 Mo. 361; Com. v. Bosworth, 22 Pick. 397; Ray v. State, 1 G. Greene (Iowa) 316; 48 Am. Dec. 379; Olive v. State, 11 Neb. 1; Com. v. Brooks, 9 Gray 299; Gray v. People, 26 Ill. 344; Finley v. Hunt, 56 Miss. 221; United States v. Ybanez, 53 Fed. Rep. 536; State v. Union, 117 Mo. 302. See also cases last cited.

3, Ingalls v. State, 48 Wis. 647; Com. v. Savory, 10 Cush. 535; Collins v. People, 98 Ill. 584; 38 Am. Rep. 105; Ray v. State, 1 G. Greene (Iowa) 316; 48 Am. Dec. 379; State v. Potter, 42 Vt. 495; Steph. Ev. art. 121. See secs. 903 *et seq. infra*.

4, Com. v. Holmes, 127 Mass. 424.

§ 788. What facts may serve as corroboration of accomplices.—It is generally agreed that the matters in corroboration should relate to some portion of the testimony which is material to the issue, but *need not extend to every material fact.*¹ The fact that the accomplice had testified truthfully to matters entirely immaterial would afford no confirmation of his statements as to the main facts.² The corroborating circumstances should not merely tend to prove that an offense has been committed, but they should tend to *identify the defendant* as the criminal, or to show his connection with the offense.³ A man who has been guilty of a crime himself will always be able to relate the facts of the case; and if the confirmation be only the truth of that history, without identifying the persons, that is really no corroboration at all. As corroboration, it has

been held sufficient to show possession by the defendant of the goods alleged to be stolen. This is, however, merely presumptive, and may be rebutted.⁴ Such admissions, declarations or conduct of the defendant as might excite suspicion also serve to corroborate the testimony of accomplices,⁵ as do writings or other documentary evidence which tend to show concert of action between the accomplice and defendant,⁶ or the fact that the accused was near the place where the offense was committed at the time of its commission, especially if an *alibi* is claimed by him.⁷ But those who make an early disclosure of the offense to the authorities, and, under their direction, continue to act with the guilty persons, but for the purpose of bringing them to justice are not accomplices in the sense that their testimony requires corroboration,⁸ although, of course, circumstances of this character may seriously affect their credibility.⁹ The practitioner should consult the statutes of the jurisdiction, as, in some states, statutes have been enacted declaring the rule as to accomplices.

1, *People v. Elliott*, 106 N. Y. 288; *Com. v. Holmes*, 127 Mass. 424.

2, *Com. v. Bosworth*, 22 Pick. 397; *Mailer v. State*, 68 Ala. 580; *Ray v. State*, 1 G. Greene (Iowa) 316; 48 Am. Dec. 379; *United States v. Howell*, 56 Fed. Rep. 21.

3, *Com. v. Brooks*, 9 Gray 299; *Com. v. Savory*, 10 Cush. 535; *People v. Smith*, 98 Cal. 218; *Harper v. State*, 11 Tex. App. 1; *Smith v. State*, 59 Ala. 104.

4, *Jernigan v. State*, 10 Tex. App. 546; *Ford v. State*, 70 Ga. 722; *Com. v. Savory*, 10 Cush. 535; *Boswell v. State*, 92 Ga. 581; *Ryan v. State*, 83 Wis. 486. The fact that the defendant was found in the barn where the accomplice swore that stolen goods were to be found, was held to be insufficient corroboration, *State v. Graff*, 47 Iowa 384.

5, *State v. Ford*, 3 Strob. (S. C.) 517; *People v. Cleveland*, 49 Cal. 577; *Partee v. State*, 67 Ga. 570; *Territory v. Mahoffey*, 3 Mont. 112; *People v. Collins*, 64 Cal. 293; *Harris v. State*, 31 Tex. Crim. Rep. 411; *Cox v. Com.*, 125 Pa. St. 94.

6, *State v. Kellerman*, 14 Kan. 135; *State v. Smalls*, 11 S. C. 262.

7, *Com. v. Drake*, 124 Mass. 21.

8, *Com. v. Downing*, 4 Gray 29; *Town of St. Charles v. O'Mailey*, 18 Ill. 407; *DeLong v. Giles*, 11 Ill. App. 33; *People v. Farrell*, 30 Cal. 316.

9, *Com. v. Downing*, 4 Gray 29. As to persons, not accomplices, see, *People v. Farrell*, 30 Cal. 316; *Harris v. State*, 7 Lea (Tenn.) 124; *People v. Smith*, 28 Hun (N. Y.) 626; *Com. v. Boynton*, 116 Mass. 343, a case of abortion.

§789. Telegrams not privileged.—It has often been contended that telegraphic communications, confidential in their nature, should be privileged; and the fact that, by the rules of telegraph companies or by statutes, operators are bound to secrecy has been urged as an argument for such privilege. But it is well settled that telegrams, like other written documents, are admissible, if relevant to the issue;¹ and must be produced by those having their custody on a *subpoena duces tecum*.² Of course, if a telegram is a communication between attorney and client,

or between husband and wife, or other persons, whose conversations or intercourse would be privileged on other grounds, the ordinary rule would apply.³

1, *State v. Litchfield*, 58 Me. 267; *Williamson v. Freer*, L. R. 9 C. P. 393; *Hammond v. Beeson*, 112 Mo. 190.

2, *United States v. Babcock*, 3 Dill. (U. S.) 566; *United States v. Hunter*, 15 Fed. Rep. 712; *In re Storrer*, 63 Fed. Rep. 564. But see, *Ex parte Brown*, 72 Mo. 83; 37 Am. Rep. 426.

3, *McFarlan v. Rolt*, 41 L. J. (Ch.) 649. For the rule as to the best evidence as to telegrams, see sec. 209 *supra*.

§ 790. Competency of witnesses as to transactions with deceased persons—Statutes.—The statutory rule that parties to the suit shall be competent as witnesses is, with few exceptions, subject in every state in the Union to the proviso that parties shall be incompetent to testify as to statements of or transactions or communications with persons since deceased or rendered incompetent, by reason of any mental disability, to testify as to such transaction, statement or communication. These statutes differ as to the details of their provisions, but they have been so interpreted by the courts that the rule is quite uniform throughout the United States, although there are certain fundamental differences found in the statutory provisions that divide the states into somewhat distinct classes. Most statutes make the adverse

party incompetent as to communications or transactions with a deceased or incompetent person. But the rule in a few states is more strict; in these states, it is held that the adverse party is not competent to testify as to facts equally within the knowledge of the deceased or incompetent person. Some statutes exclude only parties and their assigns, while others render incompetent all persons interested in the suit. It is usually expressly provided by these statutes that their provisions shall apply only to parties in *civil suits*, and not to those in criminal prosecutions. But all civil actions or proceedings come within the scope of the statutes, whether actions at law or not. Most of the statutes provide that the adverse party shall be made *competent if he is called as a witness by the representative of the deceased or incompetent person, or if the representative introduces evidence as to the transactions or communications* with the deceased or incompetent person. There are many other provisions common to these acts. Some of the statutes prescribe the rule with much particularity. Others simply state the general principle. But these details are not within the province of this work; and reference must be made to the statutes of each particular state to settle the details of the provisions on this subject. The *object and purpose of these statutes* is to guard against the temptation to give false testimony in re-

gard to the transaction in question on the part of the surviving party, and further to put the two parties to a suit upon terms of equality in regard to the opportunity of giving testimony. If one party to the original transaction is precluded from testifying by death, insanity or other mental disability, the other party is not entitled to the undue advantage of giving his own uncontradicted and unexplained account of the transaction. The sources of original information on the part of the representative of the deceased or incompetent person are so inadequate as compared with those of the surviving party that the law presumes the representative to be utterly unable to testify as to the details of the transaction, and hence excludes the adverse party.¹ As these acts were passed to protect the interests of the representative of the deceased or incompetent person, they do not exclude the testimony of the adverse party to such transactions when he offers *testimony that is favorable to the representative of the deceased or incompetent person.*² These statutes are construed with a view to the object sought to be accomplished by them. It has been held that, where they are mere exceptions or provisos in general laws abolishing the incompetency of parties to a suit because of interest, the adverse party is still competent to testify to transactions or communications with the deceased or incompetent

person, if such adverse party would have been incompetent under the rules established by the common law,³ or if he has been made competent by other statutes.⁴ The evidence of an adverse party is absolutely excluded by an independent, affirmative enactment making him incompetent as to transactions or communications with a deceased or incompetent person.⁵ These statutes, however, do not render the adverse party incompetent to testify to *fraudulent transactions* of the deceased, as the statutes are not designed to shield wrong-doers; but the courts compel the adverse party to clearly establish the alleged fraudulent acts before admitting such testimony.⁶ The statutes apply to communications and transactions concerning written documents, as well as to verbal transactions with or statements by the deceased or incompetent person.⁷ It has been held that the term "estate of a deceased person" includes all property, real and personal, belonging to the deceased;⁸ that the term "*heirs*" means all heirs *ad infinitum*;⁹ that the term "*representatives*" includes all who succeed to the rights of the deceased, either by purchase, by descent or by operation of law,¹⁰ and that the words "*executor and administrator*" include all persons holding the estate of the deceased in a representative capacity.¹¹ But it was held in Texas that a legatee or devisee is not excluded by a statute making

"heirs and representatives" incompetent to testify as to transactions or communications with deceased or incompetent persons.¹² Under the California statute, the adverse party has been held competent, in an action *in rem*, to testify as to a personal judgment on the ground that it is not a "claim," but the opposite rule has been held in Maryland.¹³ Of course these *statutes do not make the adverse party wholly incompetent* as a witness, but simply exclude his testimony as to transactions or communications with deceased or incompetent persons;¹⁴ nor do they render the adverse party incompetent as to transactions after the death or incompetence of the person, even if they relate to his estate.¹⁵

1, Looker v. Davis, 47 Mo. 140; Fulkerson v. Thornton, 68 Mo. 46; Hollister v. Young, 41 Vt. 157; Moore v. Taylor, 44 N. H. 370, 375; Beach v. Pennell, 50 Me. 387; Chandler v. Davis, 47 N. H. 462, 464; Whitmer v. Ruckey, 71 Ill. 410.

2, Williams v. Mower, 29 S. C. 332; Thistlewaite v. Thistlewaite, 132 Ind. 355; McLaughlin v. Webster, 141 N. Y. 76; Lyon v. Ricker, 141 N. Y. 225.

3, Angell v. Hester, 64 Mo. 142; Bates v. Forcht, 89 Mo. 121; Samuel v. Partee, 53 Mo. App. 587; Beach v. Pennell, 50 Me. 587.

4, White v. Ross, 147 Ill. 427.

5, Mattoon v. Young, 45 N. Y. 696.

6, Tracy v. Kelley, 52 Ind. 535; Ellis v. Alford, 64 Miss. 8.

7, Gray v. Obear, 54 Ga. 231; Wright v. Bessman, 55 Ga. 189; Montague v. Thomason, 91 Tenn. 198.

8, Jacks v. Bradewell, 51 Miss. 881.

9, *Merrill v. Atkin*, 59 Ill. 19. Even the widow, *Lorch v. Goodacre*, 126 Ind. 224.

10, *Wamsley v. Crook*, 3 Neb. 344; *Joss v. Mohn*, 55 N. J. L. 407; *Davis v. Davis*, 26 Cal. 23; 85 Am. Dec. 157. Even a widow, *Kisling v. Shaw*, 33 Cal. 425; 91 Am. Dec. 644. But see, *Crimmins v. Crimmins*, 43 N. J. Eq. 86.

11, *Clark v. Clough*, 65 N. H. 43.

12, *Mitchell v. Mitchell*, 80 Tex. 101.

13, *Booth v. Pendola*, 88 Cal. 36; *Gunther v. Bennett*, 72 Md. 384.

14, *Sharmer v. Johnson*, 43 Neb. 509. See also cases cited in note 43 sec. 793 *infra*.

15, *Irvin v. Patchin*, 164 Pa. St. 51. See also cases cited under note 46 sec. 793 *infra*.

§ 791. **Nature of the disqualifying interest.**—The interest of the party to the transaction or communication with the deceased or incompetent person must be a *real, direct, pecuniary interest*,¹ and one adverse to the representatives of the deceased.² It has been held in some states that, if the estate of the deceased or incompetent person is not affected by the action, such testimony is competent, and may be received, even if it relates to transactions or communications with deceased or incompetent persons.³ The interest must also be *present, certain and vested* to render the adverse party incompetent, for, if it is of a doubtful character, it affects only the credibility and not the competency of the witness.⁴ Thus, it has been held that, under the Iowa code, a mere equitable interest in

the matter does not disqualify the adverse party offering himself as a witness.⁵ But, in Florida, it was held that a party interested in the property on which a mortgage was being foreclosed was incompetent.⁶ The interest of a *stockholder* does not disqualify him to give evidence in a suit by the corporation against an administrator in which he testifies as to transactions or communications with a deceased or incompetent person,⁷ nor is the auditor of a county, suing as a relator, disqualified by these statutes.⁸ A similar interest in another tract of land or in another action is not sufficient to disqualify the witness, but may affect his credibility.⁹ By the decisions under the great majority of the statutes, only those *transactions or communications* are excluded which were strictly *personal with the deceased* or incompetent person, concerning which he, if alive or competent, could testify.¹⁰ In order to bring the case within the statute, either the deceased or incompetent person must have been one who would have been a party to the suit, if alive at the time that the action was tried,¹¹ or the suit must be one in which the representative or assignee of the deceased or incompetent person is a party. *Actions by, as well as against* the representative of the deceased or incompetent person are included within the provisions of the statute.¹² Before the testimony of an adverse party will be ruled out

as incompetent under these statutes, it must be shown that the other party is deceased.¹³ No testimony will be excluded, unless all the facts necessary to bring the case within the rule appear. The *burden* of showing such disqualifying interest is upon the party objecting to the competency of a witness.¹⁴ If the testimony has been given before these facts appear, it will not be stricken out, unless upon motion based upon such facts.¹⁵ The mere fact that one party is rendered incompetent by these statutes does not disqualify the other party.¹⁶ *Assignees* of deceased or incompetent persons have the same privileges as do their representatives. Their rights are just as sacred under the statutes as are those of the assignor himself.¹⁷ But an assignee has no greater rights than were possessed by the assignor; and the assignee of an adverse party cannot testify where his assignor would have been incompetent.¹⁸ The mere fact, however, that a representative is a party to the action does not make the adverse party incompetent to testify to transactions or communications with a deceased or incompetent person, for the statute applies *only when the representative is a party in his representative capacity*. For, if he seeks judgment in favor of himself or defends personally, the case does not fall within the statutes.¹⁹ Nor is the adverse party excluded in those cases in which one sues as a repre-

sentative, when he is the real party in interest, as the sole distributee.²⁰ *If the representative of a deceased or incompetent person is not a party to the suit, the statutes do not apply; and the adverse party may testify as to communications or transactions with the deceased or incompetent person;*²¹ and, even if he is a party, such testimony is not excluded, if the adverse party does not derive title from such deceased or incompetent person, but from some other source.²² *The one who attempts to exclude evidence of the adverse party on the ground that he is the representative of the deceased or incompetent person with whom the transaction or communication was had must establish the fact that he appears in a representative capacity.*²³ But this is required only when his representative capacity is denied by an appropriate plea, a general denial is not sufficient.²⁴ The adverse party cannot make his testimony competent as to transactions with a deceased or incompetent person by *calling the representative as a witness*,²⁵ nor by suing him in his representative character.²⁶ An adverse party is not made competent as to such transactions or communications by being called as a witness by his co-party,²⁷ or by joining himself as a party with those who represent the deceased as heirs.²⁸ The rule generally laid down by the courts is that mere *nominal parties to the record*, those who are made parties

without any real interest in the result of the suit, are competent to testify as to transactions or communications with a deceased or incompetent person.²⁹ But the statutes of some of the states expressly provide that these mere nominal parties shall be incompetent,³⁰ even if they have been improperly joined.³¹ It has also been held that necessary parties, even if they have not been made parties to the record, are excluded as if they had been made parties to the suit.³² The mere fact that a witness has an interest in the result of the action, if not affected by the judgment, does not render him incompetent, if he is not a party to the suit.³³ But, if the witness is a *party*, he *cannot testify to such transactions* or communications for the benefit of his co-parties, even if his testimony does not affect his own interest in any way.³⁴ A party to the original contract, who is not a party to the action, is competent to testify as to such transactions or communications.³⁵ But a real party in interest cannot, by withdrawing from the action, render himself competent.³⁶ An adverse party is not made competent by the fact that the *interest* which he has in the suit which is shared by other parties to the suit is divisible.³⁷ Of course, a person, not a party and not bound by the judgment, is competent to testify to all transactions and communications of the adverse party with the deceased or in-

competent person.³⁸ Under these statutes, the courts have excluded *negative as well as affirmative testimony* which would go to support the contention made by the surviving party to a transaction or communication with a deceased or incompetent person.³⁹ It has been held that the interest of a *next friend* is sufficient to render him incompetent as to transactions or communications with deceased or incompetent persons;⁴⁰ and also that the interest of a *cestui que trust* is such as will disqualify him as to declarations of a deceased trustee.⁴¹ A *guardian* may testify for himself in the final accounting.⁴² But a *ward* is not competent as to transactions or communications with a deceased guardian, although it has been held that he may testify as to such transactions when he is not interested in them.⁴³ An *administrator* may testify in an action against himself for embezzling or failing to inventory notes which belong to the deceased or incompetent person which he represents,⁴⁴ but he cannot show that debts were due him from the intestate.⁴⁵ Nor can a *grantor* in a deed testify against the interests of his deceased grantee's estate.⁴⁶ *Relationship to the adverse party*, if without interest in the result of the suit, affects the credibility but not the competency of a witness testifying as to transactions or communications with deceased or incompetent persons.⁴⁷ The courts have held the mother

of an adverse party a competent witness as to such transactions.⁴⁸ It has also been held that the children of an adverse party are competent as to transactions with a deceased or incompetent person.⁴⁹ A *widow* who is an interested party may testify as to conversations of herself with witnesses that have testified for the representative,⁵⁰ or to such a fact as by whom the support of the family was furnished.⁵¹ But she is not competent in her own behalf as to such communications or transactions with a deceased or incompetent person.⁵² A *husband* is not a competent witness as to such communications or transactions as are favorable to his own interest;⁵³ and neither a husband nor wife is competent as to those transactions as to which the other spouse is incompetent.⁵⁴ A *donee* is not competent as to transactions or communications with a deceased or incompetent person which tend to establish his right to property as a gift from the deceased or incompetent person,⁵⁵ but the statutes do not make a trustee of a donee an incompetent witness as to such a gift;⁵⁶ and the adverse party may testify as to communications or transactions with a trustee or donee.⁵⁷ An *heir*, an interested party, is not competent to testify as to transactions or communications with a deceased or incompetent person which are favorable to himself,⁵⁸ but it has been held that an heir, who was in open possession of the property

for some time previous to the ancestor's decease, may testify as to the gift of the same from his ancestor.⁶⁰ The interest of heirs, not parties to the action whose interests are not affected by the judgment, is too remote to render them incompetent to testify as to transactions or communications with those deceased or incompetent persons from whom they would naturally inherit.⁶¹ But an heir or other party is competent to testify as to such communications or transactions, when he has been released from all liabilities in the matter in question,⁶¹ or when he has parted with the entire interest which he formerly had in the matter. But he may be questioned as to whether such interest was parted with in good faith, as a question affecting his competency.⁶² If, however, he is made a party as a warrantor, he becomes incompetent because of interest, even if he has parted with his title to the thing in question.⁶³ So a *surety* is incompetent to testify to such communications in an action against his principal,⁶⁴ and the *principal* is incompetent in an action against a surety.⁶⁵

1, *Dickson v. McGraw*, 151 Pa. St. 98; *Bowers v. Schuler*, 54 Minn. 99. The interest of one who is a discharged bankrupt, who is therefore not liable on the note in question, is not such an interest as will disqualify him, *Hayden v. McKnight*, 45 Ga. 147. The interest of a member of a mutual benefit association, who is subject to assessment, is not sufficient to render him incompetent as a witness, *Hamill v. Supreme Council*, 152 Pa. St. 537.

2, *Gerz v. Weber*, 151 Pa. St. 396. But see, *Hollister v. Young*, 41 Vt. 156. If the representative is not a party, the rule does not apply, *Gunn v. Pettygrew*, 93 Ga. 327.

3, *Hankey v. Downey*, 10 Ind. App. 500; *Latourette v. McKeon*, (Mich.) 62 N. W. 153.

4, *Dickson v. McGraw*, 151 Pa. St. 98; *Wormsley v. Hamburg*, 40 Iowa 22; *Perine v. Grand Lodge*, 48 Minn. 82. See also, *Tretheway v. Carey*, (Minn.) 62 N. W. Rep. 815.

5, *Zeibe v. Reigart*, 42 Iowa 229.

6, *Tunno v. Robert*, 16 Fla. 738.

7, *Grange Warehouse Association v. Owen*, 86 Tenn. 355.

8, *Works v. State*, 120 Ind. 119.

9, *Lyon v. Ricker*, 141 N. Y. 225. But if the suit establishes other rights in the same property, this interest renders the witness incompetent, *Miller v. Meers*, 155 Ill. 284.

10, *Giles v. Wright*, 26 Ark. 476; *Daniels v. Foster*, 26 Wis. 686; *McKean v. Massey*, 9 Kan. 600; *Wheeler v. Arnold*, 30 Mich. 304; *Martin v. Jones*, 59 Mo. 181; *Hard v. Ashley*, 117 N. Y. 606; *Brice v. Miller*, 35 S. C. 537.

11, *Brantley v. Mayo*, 80 Ga. 678; *Lehman v. Sheiger*, 68 Wis. 145; *Canfield v. Bentley's Estate*, 60 Vt. 655; *Wilhite's Adm. v. Boulware*, 88 Ky. 169; *Costin v. McDowell*, 107 N. C. 546. But see, *Hooper v. Hooper*, 32 W. Va. 526.

12, *Ewing v. White*, 8 Utah 250.

13, *Hodgson v. Jeffreys*, 52 Ind. 334.

14, *Perine v. Grand Lodge*, 48 Minn. 82.

15, *Hill v. Helton*, 80 Ala. 528.

16, *Smith v. Hay*, 152 Pa. St. 377.

17, *Hollister v. Young*, 41 Vt. 157; *Hurry v. Kline*, 93 Ky. 358.

18, *Parcell v. McReynolds*, 71 Iowa 623; *Louis Adm. v. Easton*, 50 Ala. 470.

19, *Hamilton v. Hamilton*, 10 R. I. 538; *Lawrence v. Vilas*, 20 Wis. 381; *Esterly Co. v. Hill*, 36 Ill. App. 99; *Penny v.*

Croul, 87 Mich. 15; Howle v. Edwards, 97 Ala. 649; Prenitt v. Lambert, 19 Col. 9.

20, Chase v. Chase, (N. H. 1891) 29 At. Rep. 553.

21, Thomas v. Kelly, 74 N. C. 416.

22, Larsen v. Johnson, 78 Wis. 300; 23 Am. St. Rep. 404; Begole v. Hazzard, 81 Wis. 274.

23, Prenitt v. Lambert, 19 Col. 7; Beach v. Pennell, 50 Me. 587.

24, Espella v. Richard, 94 Ala. 159.

25, Sheehan v. Hennessey, 65 N. H. 588; Havey v. Hilliard, 47 N. H. 551.

26, Parker v. Thompson, 30 N. J. L. 311.

27, Ellis v. Stewart, (Tex.) 24 S. W. Rep. 585. See also, McMullen v. Ritchie, 64 Fed. Rep. 253.

28, Dolan v. Dolan, 89 Ala. 256.

29, Baker v. Jerome, 50 Ohio St. 682; Bowers v. Schuler, 54 Minn. 99; Walker v. Steele, 121 Ind. 436; Kingsbury v. Buckner, 134 U. S. 650, 685; Wood v. Wood, 25 S. C. 600; Hooper v. Howell, 52 Ga. 315; Scherer v. Ingerman, 110 Ind. 428.

30, Blood v. Fairbanks, 50 Cal. 420; Patterson v. Martin, 33 W. Va. 494.

31, Bilger v. Buchanan, (Tex.) 6 S. W. Rep. 408.

32, Stalling's Adm. v. Hinson, 49 Ala. 92; Alexander v. Hoffman, 70 Ill. 114.

33, McBrien v. Martin, 87 Tenn. 13; Gilder v. City of Brenham, 67 Tex. 345; Stephens v. Bernays, 42 Fed. Rep. 488; *In re* Brose's Estate, 155 Pa. St. 619; Baker v. Updike, 155 Ill. 54.

34, Pettingill v. Porter, 3 Allen 349. The rule was different in chancery, White v. Ross, 147 Ill. 427.

35, Jones v. Wolcott, 15 Gray 541; Woodson v. Jones, 92 Ga. 662; Gay v. Gay, 5 Allen 157; Looker v. Davis, 47 Mo. 140; Rank v. Grote, 110 N. Y. 12; Fitzgerald v. Williamson, 85 Ala. 585; Larsen v. Johnson, 78 Wis. 300. But see, Davis v. Bank, 48 Vt. 532.

36, O'Brien v. Weiler, 140 N. Y. 281; Messimer v. McCrearcy, 113 Mo. 382.

37, Matthews v. Hoagland, 48 N. J. Eq. 455.

38, Bunn v. Todd, 107 N. C. 266; Muir v. Miller, 82 Iowa 700; Curtis v. Hoxie, 88 Wis. 41; Blount v. Beall, 95 Ga. 182.

39, Clarke v. Smith, 46 Barb. 30; Lewis v. Merritt, 113 N. Y. 386; Redding v. Godwin, 44 Minn. 355. But parties have been allowed to testify that a check payable to the intestate or bearer was not delivered to any one but the bearer, McElhenny v. Hendricks, 82 Iowa 657.

40, Mason v. McCormick, 75 N. C. 263.

41, Stewart v. Fellows, 128 Ill. 480. But see, Wilson v. Russell, 18 Iowa 79.

42, Bogia v. Darden, 45 Ala. 269.

43, State v. Osborne, 67 N. C. 259.

44, Stewart v. Glenn, 58 Mo. 481.

45, French v. Creech, 55 Ga. 124.

46, Paxton v. Paxton, 38 W. Va. 616.

47, Fowler v. Smith, 153 Pa. St. 639; Curtis v. Hoxie, 88 Wis. 41.

48, Connolly v. O'Connor, 117 N. Y. 91; Eisenlord v. Clum, 126 N. Y. 552.

49, Anderson v. Hance, 49 Mo. 159.

50, Brown v. Foster, 112 Mo. 297.

51, Denise v. Denise, 110 N. Y. 562.

52, Achilles v. Achilles, 137 Ill. 589; Lancaster v. Blaney, 140 Ill. 203; O'Brien v. Weiler, 140 N. Y. 281; Mullins v. Chickering, 110 N. Y. 513; Gardner v. McLallen, 79 Pa. St. 398. But see, Sherwood v. Thomasson, 124 Ind. 541. See also, Dicken v. Winters, 169 Pa. St. 126.

53, Whitmen v. Foley, 125 N. Y. 651; Griffin v. Earle, 34 S. C. 246.

54, Bevelot v. Lestrade, 153 Ill. 625; Wylie v. Charlton, 43 Neb. 840; Sutherland v. Ross, 140 Pa. St. 379.

55, Yeakel v. McAtee, 156 Pa. St. 600; Hopkins v. Manchester, 16 R. I. 663; Cockrell v. Mitchell, (Miss. 1894) 15 So. Rep. 41. See also, Beard v. Bank, 39 Minn. 546.

56, Devo v. Dye, 123 Ind. 321.

57, Orr v. Rode, 101 Mo. 387.

58, Connor v. Root, 11 Col. 183.

59, Wooters v. Hale, 83 Tex. 563.

60, Hobart v. Hobart, 62 N. Y. 80; Harrow v. Brown, 76 Iowa 179; Curtis v. Hoxie, 88 Wis. 41. See also, Chambers v. Hill, 34 Mich. 523.

61, Morris v. Bank, 93 Ala. 511; Loder v. Whelpley, 111 N. Y. 239.

62, Buck v. Patterson, 75 Mich. 397.

63, Bennett v. Virginia Ranch Company, 1 Tex. Civ. App. 321.

64, Kyte v. Foran, 167 Pa. St. 252. See also, *In re Spott's Estate*, 156 Pa. St. 281.

65, Grommes v. St. Paul Trust Co., 147 Ill. 634.

§792. Waiver under the statutes.—This exception to the statutory rule removing the incompetency of parties was introduced for the benefit of those representing the deceased or incompetent person; and their *representatives may*, if they choose, *waive this privilege*. All *objection* to the competency of a witness as to a transaction with an incompetent or deceased person will be *deemed waived*, if it is *not made at the time* that the evidence is given.¹ But the objection to such testimony is not waived merely by the fact that a witness is examined by the representative to ascertain whether he is rendered incompetent by

these statutes.² The *strict rule* that the adverse party is incompetent to testify to any fact equally within the knowledge of the deceased has, however, been *established in some states*.³ The courts of these states hold that the mere fact of knowledge on the part of the deceased or incompetent person, no matter how slight that knowledge may have been, is sufficient to disqualify the adverse party.⁴ They also hold that evidence as to facts equally within the knowledge of the deceased or incompetent person can not be received, even if his representative does not object to it when it is offered.⁵ The privilege of objecting to the competency of an adverse party as a witness to transactions or communications with a deceased or incompetent person is *waived when the representative calls the adverse party as a witness*;⁶ and, when so called, the adverse party may testify as to the whole transaction.⁷ The privilege of objecting to the competency of the adverse party is also deemed to be waived, *if the representative introduces testimony as to the transaction* or communication in question.⁸ This may be done by introducing the deposition of the deceased or incompetent person.⁹ This renders the adverse party competent to testify fully as to those transactions dealt with in the deposition, but *he can not go into other communications or transactions*.¹⁰ So the introduction of a writing does not make the adverse party compe-

tent to show what was said and done when that writing was made,¹¹ but when the representative has gone into the writings, the adverse party becomes competent as to the whole transaction.¹² When a deposition is introduced merely to show the identity of two causes of action, this does not make the adverse party competent to testify as to any transactions or communications with the deceased or incompetent persons.¹³ So the mere fact that the deposition of a deceased or incompetent person has been taken before the death or incompetency of the party occurred does not render the adverse party competent, unless it has been read,¹⁴ even if it is in court.¹⁵ But the representative waives the right to object to the testimony of the adverse party as to such transactions or communications, if he has caused the *deposition of the adverse party* to be taken. The deposition may be read by the adverse party himself, if the representative refuses to read it, despite the fact that it deals with transactions or communications with a deceased or incompetent person.¹⁶ So the adverse party may render himself competent as to such transactions or communications by introducing deposition of the decedent or that of himself, taken before the death of the other party.¹⁷ So objections to the competency of the adverse party may be waived *if the testimony of the deceased or incompetent person which has been preserved*

in the bill of exceptions *is introduced*,¹⁸ or if such *testimony*, taken *at a former trial* or hearing of the action, is presented by the representative.¹⁹ If the whole of the testimony so taken is not read, the adverse party may read as much more as he deems necessary to present his case fairly to the jury;²⁰ and, as in the case of depositions, the adverse party may himself testify as to transactions with the deceased or incompetent person which were dealt with in the testimony so introduced.²¹ The rule is that the *evidence must be competent at the time it is given*. If the adverse party has died or become incompetent since the trial began, the other party is disqualified by these statutes, as they have reference to the time of trial, rather than to that at which the suit was begun.²² So if the other party to the action has died or become incompetent since being examined, the adverse party is not competent as to transactions with the deceased party which are not treated in this testimony.²³ Nor is the adverse party competent to testify as to transactions with a deceased or incompetent person, even if at a *former trial* of the same action, occurring before his death or incompetency, the *deceased or incompetent person testified* fully as to such transactions, unless this testimony should have been introduced by the representative.²⁴ The mere fact that the representative called the adverse party at a former trial does not make

him competent as to any such communication or transaction at a new trial of the action, unless the representative in some way waives the privilege of objecting to the competency of the adverse party as a witness.²⁶ *If the representative testifies or calls other witnesses to testify as to transactions or communications of the deceased or incompetent with the adverse party, he thereby waives his right to object to the testimony of the adverse party. But the adverse party is competent only as to those transactions or communications concerning which testimony has been given,*²⁶ but he may, of course, go fully into all those transactions.²⁷ The courts of some states, however, hold that, if the representative has introduced testimony as to any transaction with any deceased or incompetent person, the adverse party may testify generally and to any extent.²⁸ But the general rule is as stated. The adverse party cannot testify as to any *transactions other than those concerning which the representative has introduced evidence*, even though such testimony as to a separate and independent transaction or communication would tend to contradict the testimony given as to the transaction in question.²⁹ Nor does the mere fact that the representative has offered himself as a witness, when he has not gone into these transactions or communications of the adverse party and the deceased, make the adverse party compe-

tent.³⁰ *When the representative has introduced evidence as to transactions between the deceased and the adverse party, the court has no discretion to receive or refuse the testimony as he sees fit. It must receive the testimony of the adverse party, if it is offered in such case.*³¹ The incompetency of the adverse party may also be removed by his *being cross-examined as to the transaction* in question by the representative;³² and he is thereby rendered competent to testify to the whole of that particular transaction.³³ But cross-examination as to conversations that did not take place between the deceased and the adverse party does not warrant a general examination as to the decedent's conversations on the subject matter of the controversy.³⁴ The Illinois court has held that, by such cross-examination, the representative does not waive the right to object to such testimony as incompetent after it has been given.³⁵ *The adverse party may cross-examine the witnesses introduced by the representative fully as to the whole of the transaction or communication in question,*³⁶ but he cannot cross-examine the representative as to facts not touched in the direct examination,³⁷ and thus make his own testimony competent.³⁸ The weight of authority holds that, in *cases where both parties represent deceased or incompetent persons, both are incompetent under these statutes by virtue of their office.*³⁹

But either of them may render himself competent, if he is not otherwise interested in the controversy, by resigning his office.⁴⁰ The *general rules of evidence apply* in all cases arising under these statutes, unless expressly abrogated by the statutes themselves. *Admissions* of the adverse party are competent as to communications or transactions with the deceased or incompetent person,⁴¹ but the adverse party may testify to rebut these admissions.⁴² So it has been held that these statutes do not remove the incompetency of husband and wife, nor do they allow attorneys to testify to *confidential communications*.⁴³

1, Norris v. Stewart's Heirs, 105 N. C. 455; Parrish v. McNeal, 36 Neb. 727. Contra, McHugh v. Dowd's Estate, 86 Mich. 412. See also, Achilles v. Achilles, 137 Ill. 589. So in states where the representative is not allowed to testify in his own behalf, unless called by the court or adverse party, objection to the competency of his evidence is deemed to be waived, unless made when the testimony is offered, Denbo v. Wright, 53 Ind. 226.

2, Tretheway v. Carey, (Minn.) 62 N. W. Rep. 815.

3, Wood v. Fox, 8 Utah 380; McHugh v. Dowd's Estate, 86 Mich. 412; Simpson v. Gafney, 66 N. H. 261.

4, Kimball v. Kimball, 16 Mich. 211.

5, McHugh v. Dowd's Estate, 86 Mich. 412.

6, Keithley v. Stafford, 126 Ill. 507; Bartlett v. Burden, 11 Ind. App. 419; Warren v. Adams, 19 Col. 515; Dunlap v. Dunlap, 94 Mich. 11.

7, Nicolls v. Esterley, 16 Kan. 32; Warren v. Adams, 19 Col. 515.

8, Mumma v. Owens, 2 Dill. (U. S.) 475; Burleigh v. White, 64 Me. 23; Dowis' Heirs v. Elliott, (Ky.) 29 S. W. Rep. 142.

9, *Monrore v. Napier*, 52 Ga. 385; *Rakes v. Brown*, 34 Neb. 304; *Eaves v. Harbin*, 12 Bush (Ky.) 445; *Allen v. Chouteau*, 102 Mo. 309; *Mumm v. Owens*, 2 Dill. (U. S.) 475.

10, *Burleigh v. White*, 64 Me. 23; *Allen v. Chouteau*, 102 Mo. 309; *Jackson v. Jones*, 74 Tex. 104.

11, *Woodbury v. Woodbury's Estate*, 48 Vt. 94.

12, *Sheipp v. Davis*, 78 Ga. 20.

13, *Furbush v. Barker*, 38 Neb. 1.

14, *Levy v. Dwight*, 12 Col. 101. See also, *Messimer v. McCrary*, 113 Mo. 382.

15, *Hollis v. Calhoun*, 54 Ga. 115.

16, *Thomas v. Irwin*, 90 Tenn. 512; *Neis v. Farquharson*, 9 Wash. 508.

17, *Coble v. McClintock*, 10 Ind. App. 562.

18, *Stone v. Hunt*, 114 Mo. 66.

19, *Beardslee v. Reeves*, 76 Mich. 661. But see, *Green v. Gould*, 3 Allen 465.

20, *Beardslee v. Reeves*, 76 Mich. 661.

21, *Stone v. Hunt*, 114 Mo. 66.

22, *Hart v. McGrew*, (Pa. 1887) 11 At. Rep. 617. A deposition used on the trial cannot be suppressed on appeal because of the death of the adverse party since the trial, *Hinkson v. Ervin*, (W. Va.) 20 S. E. Rep. 849.

23, *Beckhaus v. Ladner*, 48 N. J. Eq. 152.

24, *Taylor v. Bunker*, 68 Mich. 258; *Cake v. Cake*, 162 Pa. St. 584.

25, *Bair v. Frischkorn*, 151 Pa. St. 466.

26, *Rakes v. Brown*, 34 Neb. 304; *Parrish v. McNeal*, 36 Neb. 727; *Martin v. Martin*, 118 Ind. 227; *Griffin v. Griffin*, 125 Ill. 430; *Bryant v. Stainbrook*, 40 Kan. 356; *Kelton v. Hill*, 59 Me. 259; *Murphy v. Ray*, 73 N. C. 588; *Waters v. Davis*, (Ky. 1887) 2 S. W. Rep. 695; *Corning v. Walker*, 100 N. Y. 547, 550; *Rankin v. Hannan*, 38 Ohio St. 438; *Williams v. Cooper*, 113 N. C. 286. But see, *Redding v. Godwin*, 44 Minn. 355; *Allen v. Jones*, 1 Ind. App. 63.

27, *Matthews v. Hoagland*, 48 N. J. Eq. 455; *McCartin v. Traphagen's Adm.*, 45 N. J. Eq. 265; *Nay v. Curley*, 113 N. Y. 575.

28, *Dow v. Merrill*, 65 N. H. 107. But the New Hampshire court holds that the identification of the deceased's books by his representative is not an election on his part to testify or a waiver of the privileges of the statute, *Sheehan v. Hennessey*, 65 N. H. 101.

29, *Martin v. Hillen*, 142 N. Y. 140.

30, *McCartin v. Traphagen's Adm.*, 45 N. J. Eq. 265.

31, *Ballou v. Tilton*, 52 N. H. 605.

32, *Michigan Savings Bank v. Estate of Buller*, 98 Mich. 381; *Boyd v. Conshohocken Mill*, 149 Pa. St. 363. But see, *Green v. Gould*, 3 Allen 465.

33, *Foster v. Hess*, (Minn. 1894) 59 N. W. Rep. 193; *Smith v. Smith*, 101 N. C. 461; *Clift v. Moses*, 112 N. Y. 426.

34, *Lahey v. Heenan*, 81 Pa. St. 185; *Perry v. Mulligan*, 58 Ga. 479.

35, *Achilles v. Achilles*, 137 Ill. 589.

36, *Brown v. Foster*, 41 S. C. 118.

37, *Williams v. Cooper*, 113 N. C. 286.

38, *Corning v. Walker*, 100 N. Y. 547.

39, *Mills v. Davis*, 113 N. Y. 243; *Snyder v. Fiedler*, 139 U. S. 478; *Bowie v. Bowie*, 77 Md. 311.

40, *Snyder v. Fiedler*, 139 U. S. 478.

41, *Treadwell v. Lennig*, 50 Fed. Rep. 872.

42, *Johnson v. Heald*, 33 Md. 352; *Stewart v. Kirk*, 69 Ill. 509.

43, *Wooster v. Hill*, 22 Fed. Rep. 830; *Lucas v. Brooks*, 18 Wall. 453; *Connecticut Life Ins. Co. v. Schaefer*, 94 U. S. 457.

§ 793. Meaning of the term "transaction."—The term "*transaction*" which is used

in nearly all the statutes has not been given any very definite meaning by the courts. Whatever may be done by one person which affects another's rights, and out of which a cause of action may arise, is a transaction.¹ It is a *broader term than contract*, for while every contract is a transaction, every transaction is not a contract.² But the courts have interpreted the term as the justice of each case seemed to demand, rather than by any abstract definition, as will be seen by a few of the decided cases. The execution of a note by a deceased person,³ or the delivery of a letter or of property⁴ is such a transaction with the deceased as to render the adverse party incompetent to testify to the same under the statute. It has been held that the adverse party is also incompetent in suits, in which a representative is a party, to testify as to a bargain or a contract as to services, which was made with the deceased or incompetent person,⁵ or as to the value of the services rendered,⁶ or even that the services were performed.⁷ Nor can he testify that the account sued on is correct,⁸ or that the work done had not been paid for,⁹ or as to the kind of work done or what pay was expected for the same,¹⁰ or that the note in question had been paid,¹¹ or that money had been deposited with the deceased or incompetent person.¹² So the alleged marriage of the deceased, when it is the question in issue, is a transaction

within the meaning of the statute.¹³ It has been held that these statutes render incompetent testimony to prove the contents of lost deeds¹⁴ or of lost letters,¹⁵ even if the representative of the deceased or incompetent person has been given notice to produce the originals,¹⁶ the want of notice of protest,¹⁷ the consideration of a deed or note,¹⁸ the date of a debt against the deceased¹⁹ or that the mortgage in question was mere security for notes that the deceased had endorsed for the mortgagor.²⁰ An adverse party cannot testify as to transactions or communications with a deceased or an incompetent person which are favorable to himself, such as would release him from a debt to the deceased or incompetent person,²¹ or show that a debt was due him from such deceased or incompetent person or that the deceased was jointly bound with him.²² Nor can the representative of the deceased or incompetent person testify as to transactions with such deceased or incompetent person that are favorable to himself personally.²³ Among the *things decided* by the courts *not to be transactions* with the deceased or incompetent person, within the meaning of this statute, are the finding of a will or other document after the death of the deceased,²⁴ the carrying of supplies to the decedent,²⁵ the occupation of land without agreement,²⁶ testimony as to the situation of an abutment of an old bridge,²⁷ the loss of a

note sued on,²⁸ the proving of residence when material,²⁹ the insolvency of sureties,³⁰ the attempt to collect a note³¹ or to sell goods³² and the instructions to a person who wrote letters or drew instruments for the deceased.³³ When the meaning of such documents is obscure, the scrivener who wrote them may explain their purport, even though one of the parties is dead.³⁴ It has been held that the statutes do not apply to actions by administrators to recover damages from a railway for killing the deceased.³⁵ The statutes do not render the adverse party incompetent to testify as to the quality of the board furnished the incompetent or deceased person and as to the length of time for which the board was given,³⁶ but he is incompetent as to conversations with the deceased or incompetent person as to such board.³⁷ The adverse party is competent to testify as to the condition of the deceased or incompetent person and as to the amount of time required to care for him,³⁸ or to the amount of money collected,³⁹ or to the contract of hire by which the deceased gained possession of the property in question⁴⁰ or that the deceased knew the amount of work that the adverse party had done, when this information on the part of the adverse party was not gained from conversations with the deceased.⁴¹ But the statutes in some of the states, by expressly excluding the testimony of the adverse party

as to facts equally within the knowledge of the deceased or incompetent person, makes this rule of no force in those jurisdictions. Most of the authorities hold that the adverse party cannot prove the genuineness of the *signature* of a deceased or incompetent person to an instrument in which he is interested.⁴³ Nor can the adverse party testify that the signature to an instrument, unfavorable to his interest, was procured by fraud.⁴⁴ But these statutes do not make the adverse party incompetent to prove the signature of a deceased or incompetent person to a collateral instrument.⁴⁵ In general, the adverse party *may testify to any fact which is not either a transaction, a communication or a statement* of the deceased or incompetent person, even if it is material to the case, unless the statute expressly makes him incompetent as to facts equally within the knowledge of the deceased or incompetent person.⁴⁶ If the *transaction* relative to the estate of the deceased or incompetent person occurred *after the person died* or became incompetent, the adverse party is, as a rule, competent to testify as to them.⁴⁷ But this rule does not apply, of course, when the representative with whom the transaction was had is himself dead. It has been held in Illinois, however, that, if the representative is a guardian or trustee, these transactions must be subsequent to the time when the ward or *cestui que*

trust became of age as well as after the death or incompetency of the deceased or incompetent person, in order to bring the case within the rule just stated."

- 1, *Scarborough v. Smith*, 18 Kan. 399, 406.
- 2, *Roberts v. Donovan*, 70 Cal. 108, 113.
- 3, *Gist v. Gaus*, 30 Ark. 285; *Auchampaugh v. Schmidt*, 72 Iowa 656.
- 4, *Howard v. Zimpleman*, (Tex.) 14 S. W. Rep. 59. letter; *Dicken v. Winters*, 169 Pa. St. 126, property.
- 5, *Wagner v. Robinson*, 56 Ga. 47; *Berry v. McArdle*, 62 N. H. 354.
- 6, *Wagner v. Robinson*, 56 Ga. 47; *Shain v. Forbes*, 82 Cal. 577.
- 7, *Herring v. Herring's Estate*, (Iowa) 62 N. W. Rep. 666.
- 8, *Boyd v. Canthen*, 28 S. C. 72.
- 9, *Lerche v. Brasher*, 104 N. Y. 157; *Ridler v. Ridler*, (Iowa) 61 N. W. Rep. 994; *Cole v. Marsh*, (Iowa) 60 N. W. Rep. 659.
- 10, *Cowen v. Musgrave*, 73 Iowa 384.
- 11, *Montague v. Thomason*, 91 Tenn. 168; *Jockisch v. Hardtke*, 50 Ill. App. 202.
- 12, *Nunnally v. Becker*, 52 Ark. 550.
- 13, *Hopkins v. Bowers*, 111 N. C. 175. The rule is otherwise where this is not the question directly in issue, *Green v. Green*, 126 Mo. 17.
- 14, *King v. Worthington*, 73 Ill. 161.
- 15, *Schratz v. Schratz*, 35 Mich. 485; *Sabre v. Smith*, 62 N. H. 663.
- 16, *Webster v. LeCompte*, 74 Md. 249.
- 17, *Lewis v. Weisham*, 1 Mo. App. 222.
- 18, *Rickman v. Atwood*, 71 Ill. 155.

- 19, Buie v. Scott, 107 N. C. 181.
- 20, Terhune v. Oldis, 44 N. J. Eq. 146.
- 21, Luetchford v. Lord, 132 N. Y. 465; Farnam v. Virgin, 52 Me. 576; Mell v. Barner, 135 Pa. St. 151; Simpson v. Simpson, 107 N. C. 552; Nau v. Brunette, 79 Wis. 664. But see, Cole v. Gardner, 67 Miss. 670.
- 22, Skelton v. Richardson, 77 Ga. 546; Robinson v. Dugan, (Cal.) 35 Pac. Rep. 902; Quarrier's Adm. v. Quarrier's Heirs, 36 W. Va. 310.
- 23, Tuck v. Nelson, 62 N. H. 469; Whiteside v. Green, 64 N. C. 307; Fisher v. Mandell, 83 Ga. 715; *In re Kellogg*, 104 N. Y. 648; Goodwin v. Goodwin, 48 Ind. 584.
- 24, Griffin v. Griffin, 125 Ill. 430; Cornelius v. Brawley, 109 N. C. 542. See also, Potter v. Nelson's Ex., 121 Pa. St. 628; Resseguie v. Mason, 58 Barb. (N. Y.) 89, 99.
- 25, Cowan v. Layburn, 116 N. C. 526.
- 26, Brown v. Moore, 26 S. C. 160.
- 27, Krepps v. Carlisle, 157 Pa. St. 358.
- 28, Nash v. Gibson, 16 Iowa 305.
- 29, Trimble v. Mims, 92 Ga. 103.
- 30, Topping v. Windley, 99 N. C. 4.
- 31, White v. Beaman, 96 N. C. 122.
- 32, Steiner v. Eppinger, 61 Fed. Rep. 253.
- 33, Smith v. Pierce, 65 Vt. 200; Spencer v. Boardman, 118 Ill. 553.
- 34, Shoemaker v. Smith, 80 Iowa 655.
- 35, Louisville Ry. Co. v. Thompson, 107 Ind. 442.
- 36, Prichard v. Prichard, 69 Wis. 373.
- 37, Heyne v. Doerfler, 124 N. Y. 505.
- 38, Sullivan v. Lattimer, 38 S. C. 158; Marietta v. Marietta, 90 Iowa 201. See also, Todd v. Martin, (Cal.) 37 Pac. Rep. 872.
- 39, Lewis v. Meginniss, 30 Fla. 419.

40, Penny v. Black, 6 Bosw. (N. Y.) 50.

41, Toggeth v. Gaffney, 33 S. C. 303; Trimmier v. Thompson, 41 S. C. 125, a leading case.

42, Merritt v. Straw, 6 Ind. App. 360; Holliday v. McKinne, 22 Fla. 153. See also, *In re* Toomey's Estate, 150 Pa. St. 535; Keener v. Zartman, 144 Pa. St. 179; Sawyer v. Grandy, 113 N. C. 42; Cole v. Marsh, (Iowa) 60 N. W. Rep. 659.

43, Watthaus v. Schack, 105 N. C. 332.

44, Ferebec v. Prichard, 112 N. C. 83.

45, Harrington v. Samples, 36 Minn. 200; Moores v. Wills, 69 Tex. 109; *In re* Taylor's Estate, 154 Pa. St. 183; McCaul v. Wilson, 101 N. C. 598; Richards v. Munro, 30 S. C. 284; Sherbley v. Hill, 57 Ga. 232; Harris v. Seinsheimer, 67 Tex. 356; Adams v. Allen, 44 Wis. 93; March v. Verble, 79 N. C. 19; Clary v. Smith, 20 Kan. 83; Sharmer v. Johnson, 43 Neb. 509.

46, Brown v. Brown, 48 N. H. 90; Poe v. Donec, 54 Mo. 119; McGlothlin v. Henry, 59 Mo. 213; Stone v. Cook, 79 Ill. 424; Swasey v. Ames, 79 Me. 483; Moore v. Dutton, 79 Ga. 456; Griffin v. Griffin, 125 Ill. 430; Leeper v. Taylor, 111 Mo. 312; Potter v. Nelson, 121 Pa. St. 628; Cornelius v. Brawley, 109 N. C. 542; Witherspoon v. Blewett, 47 Miss. 570; Voiles v. Voiles, 51 Ind. 385; Waldman v. Crommelin, 46 Ala. 580. A breach of a lease, since the lessor's death, does not make the lessee competent to testify against the administrator, Briggs v. McCurley, 76 Md. 409.

47, Stone v. Cook, 79 Ill. 424.

1794. Transactions with partners or agents, or in the presence of third persons.—The statutes and decisions in the various jurisdictions modify the general rule somewhat when the parties to the transaction in question stand in some *special relation* to each other, as is the case with partners and principals and agents. In case a *mem-*

ber of a partnership dies, the surviving members are representatives within the meaning of these statutes, and the adverse party is not competent as to a transaction or communication with such deceased or incompetent partner, in which he appeared in his capacity as a member of the firm.¹ If, however, the transaction or communication was *in the presence of a surviving partner*, the adverse party is thereby made competent to testify as to such transaction or communication.² Some authorities hold that, if the surviving partners enjoy the benefits of the transaction or are seeking to enforce rights acquired because of it, they will not be allowed to claim the privilege of excluding the testimony of the adverse party.³ Some of these courts hold this rule because of the nature of the partnership relation, others because of the wording of the statutes. It has been held that the surviving partners cannot be excluded under statutes that make assignees incompetent as to such communications or transactions.⁴ The survivors cannot testify for themselves nor for each other against the representative of a deceased or incompetent person, even if he were a partner in their firm;⁵ nor are they competent witnesses to establish the existence of the partnership relation between themselves and the deceased or incompetent person.⁶ But the mere fact that the deceased was a member of the partnership, and that

the matters in controversy relate to the partnership affairs does not take the case out of the general rule, unless the testimony offered was adverse to the interest of the representative.⁷ The *reason for the rule* rendering the adverse party incompetent as to transactions or communications with the deceased or incompetent person is often *wanting when an agent represented either party* in the transaction or communication in question, for such agent is competent to testify to all that took place, and to all that was said at that time. Since he is not interested in the result of the action, nor bound by the judgment, he is deemed an impartial witness. This exception does not, however, override the general rule, so as to make an adverse party competent by the fact that the representative of the deceased or incompetent person who is a party to the action acted for the deceased as an agent in the transaction in question.⁸ But the courts guard the right of the representative of the deceased or incompetent person to object to such testimony carefully, and hold that the *existence of the agency must first be determined* by the court before testimony can be considered competent because an agent participated in the transaction or communication.⁹ The adverse party is competent to testify to transactions or communications with a deceased or incompetent person which were made with an agent of

such a person in cases in which the *agent is still alive and competent to testify*.¹⁰ But the testimony of the adverse party must be confined to those transactions or communications which were had with the agent.¹¹ The *death of the agent* of either party does not render the other party incompetent to testify to transactions conducted by the deceased agent for his principal who is still alive and competent to testify. The principal is not the survivor of the agent; nor is the estate of the agent affected by the action.¹² The rule is not uniform in the different states as to the *competency of the agent of the adverse party* to testify to transactions or communications with the deceased or incompetent person. The rule more generally adopted seems to be that, as the agent is not a party to the action nor bound by the judgment, he is a competent witness for the adverse party to prove any transaction or communication with the deceased or incompetent person.¹³ Much of the apparent conflict in regard to this rule arises from the varying provisions of the statutes. An agent is *competent to prove the fact of his agency* and the extent of his authority, even if his principal is deceased or incompetent.¹⁴ But a husband has been held incompetent to testify that his wife acted as his agent in all transactions with the deceased or incompetent person.¹⁵ But *if, in any case, an agent becomes personally respon-*

sible, as for fraudulent transactions in the execution of his agency, he is then an interested party, and is, in all cases, incompetent to testify as to transactions or communications with the deceased or incompetent person.¹⁶ One who has acted as an agent is, of course, competent in actions between himself and a party to the contract, even if the subject of the action belonged to the deceased.¹⁷ The rule is not the same *where the agent represented a public or a private corporation*. In such case, the adverse party is not competent to testify as to transactions or communications with the deceased agent of the corporation who conducted its business, as the corporation, being a mere artificial person, cannot be the survivor of an agent and can have no knowledge of the transaction or communication in question.¹⁸ But if the transaction was had with two officers or agents of the corporation, so that there is a survivor who has personal knowledge of such transaction, the adverse party is competent as to such transaction.¹⁹ The *dissolution of the corporation* does not make the adverse party incompetent, if the agent or officer with whom the transaction was had is still living and competent to testify, as the statutes refer to the death of natural persons, and not to that of artificial beings.²⁰ One attempting to compel a corporation to transfer stock to him is a competent witness in his own behalf, al-

though the person from whom he bought the stock be deceased or incompetent.²¹ It was held in Illinois that a *stockholder of a corporation*, against which suit has been brought, can, on the trial of the action, testify only to such matters occurring before the death of the deceased as have been gone into by the representative who is suing for the benefit of the estate of the deceased.²² As a *third party, present* when the transaction or communication of the deceased or incompetent person with the adverse party occurred, who is not a party to the suit against the representative, or affected by the judgment in the case, has no motive to testify falsely, the courts hold such third persons competent as to such transactions or communications.²³ This is true, even if the parties or third persons are husbands or wives or other relatives of the parties to the suit, provided they did not participate in the transaction or communication.²⁴ But the fact that conversations of the deceased and adverse party were overheard by a third person *does not make the adverse party competent* as to such conversations.²⁵ The adverse party may, however, testify as to *conversations between the deceased or incompetent person and a third party* which were overheard by him.²⁶ He is also competent to testify to communications or *transactions with third persons* in regard to the transaction or communication which is

involved in the case.²⁷ But he cannot rebut testimony given by a third person as to what took place in an interview between himself and the deceased and incompetent person as to the transaction.²⁸ The *account books* of either party may be introduced in evidence, even if one party to the transaction is dead. But the court must first be satisfied by evidence, given by the party introducing the books, that they contain a full and fair account of the transaction of the deceased or incompetent person with the adverse party.²⁹ The adverse party cannot, however, testify that the deceased or incompetent person gave him a book containing an account of money claimed to have been deposited with the deceased or incompetent by the adverse party, when such book is not produced in court;³⁰ nor can the adverse party testify to a settlement of the book account sued upon by the representative.³¹ As the rules stated in this section are all exceptions to the general rule, the party offering such testimony must, in each case, show that the conditions exist that make such testimony competent before it can be received.³²

1, *Harris v. Bank*, 22 Fla. 501; 1 Am. St. Rep. 201; *Lawrence v. Vilas*, 20 Wis. 381; *Baxter v. Leith*, 28 Ohio St. 84; *Hanna v. Wray*, 77 Pa. St. 27; *Adams v. Eatherly Hardware Co.*, 78 Ga. 485.

2, *Lawrence v. Vilas*, 20 Wis. 381; *McGehee v. Jones*, 41 Ga. 123; *Paddock v. Potter*, 67 Vt. 360.

3, *Fales v. Jordan*, 44 Miss. 283; *Wood v. Stewart*, 9 Ind. App. 321; *Clapp v. Hull*, 18 R. I. 652. Contra, *Hook v. Bixby*, 13 Kan. 164; *Wiley v. Morse*, 30 Mo. App. 266; *Parker v. Edwards*, 85 Ala. 246.

4, *Carlton v. Mays*, 8 W. Va. 245; *Tremper v. Conklin*, 44 Barb. (N. Y.) 456. Contra, *Standbridge v. Catanach*, 83 Pa. St. 368.

5, *Godfrey v. Templeton*, 86 Tenn. 161; *Dick v. Williams*, 130 Pa. St. 41; *Graham v. Howell*, 50 Ga. 203.

6, *Cooper v. Wood*, 1 Col. App. 101; *Adams v. Morrison*, 113 N. Y. 152.

7, *Hosmer v. Burke*, 26 Iowa 353.

8, *Whittaker v. Groover*, 54 Ga. 174.

9, *Cairns v. Mooney*, 62 Vt. 172.

10, *Smith v. Smith's Estate*, 91 Mich. 7; *Hanf v. Northwestern Aid Assn.*, 76 Wis. 450; *Miller v. Wilson*, 126 Mo. 48; *Kansas Manufacturing Co. v. Wagoner*, 25 Neb. 439; *Andrews v. Fendall*, 7 Mackey (D. C.) 311; *Reherd's Adm. v. Clem*, 86 Va. 374; *Davis v. Hawkins*, 163 Pa. St. 228.

11, *Reherd's Adm. v. Clem*, 86 Va. 374.

12, *Reynolds v. Iowa Ins. Co.*, 80 Iowa 563; *Crawford v. Hildebrandt*, 65 N. Y. 107; *Sprague v. Bond*, 113 N. C. 557; *Poquet v. North Hero*, 44 Vt. 91; *Spencer v. Trafford*, 42 Md. 1; *Voss v. King*, 33 W. Va. 236; *Roberts v. Richmond Co.*, 109 N. C. 670; *Kansas Manufacturing Co. v. Wagoner*, 25 Neb. 439; *Cornell v. Barnes*, 26 Wis. 473. Contra, *Robertson v. Reed*, 38 Mo. App. 32. By the provisions of some of the statutes, the adverse party is expressly made incompetent as to transactions or communications with agents of deceased or incompetent persons, *Warren v. Strane*, 82 Ala. 34.

13, *Nerpass v. Gilman*, 104 N. Y. 506; *Fidelity & C. Co. v. Goff's Ex.*, (Ky.) 30 S. W. Rep. 626; *Darwin v. Keigher*, 45 Minn. 64; *Shaub v. Smith*, 50 Ohio St. 648; *Krause v. Equitable Life Assurance Soc.*, (Mich.) 63 N. W. Rep. 440. Contra, *Insurance Co. of N. A. v. Brim*, 111 Ind. 281; *McCamy v. Cavender*, 92 Ga. 254. But this last case holds

that where the agent took no part in the transaction or communication, but simply overheard what was said and is in no way affected by the judgment, he is competent.

14, *Samuel v. Bartee*, 53 Mo. App. 587; *Gifford v. Thomas' Estate*, 62 Vt. 34; *Davis v. Davis*, 93 Ala. 173.

15, *Sanborn v. Cole*, 63 Vt. 590.

16, *Butz v. Schwartz*, 135 Ill. 180.

17, *Davis v. Hawkins*, 163 Pa. St. 228.

18, *Farmers Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 155; *Williams v. Edwards*, 94 Mo. 447; *Downing v. Woodstock Co.*, 93 Ala. 262; *Langford v. Commissioners*, 75 Ga. 502. *Contra*, *Bexar Association v. Newman*, (Tex. Civ. App. 1893) 25 S. W. Rep. 461.

19, *Lytle v. Chicago & W. M. Ry. Co.*, 84 Mich. 289.

20, *Williams v. Edwards*, 94 Mo. 447.

21, *Firemen's Ins. Co. v. Peck*, 126 Ill. 493.

22, *Consolidated Ice Co. v. Kiefer*, 26 Ill. App. 466.

23, *Klopper v. Levi*, 33 Mo. App. 322; *Propst v. Fisher*, 104 N. C. 214; *Thomas v. Miller*, 165 Pa. St. 216.

24, *Sullivan v. Latimer*, 38 S. C. 158; *Gable v. Hamer*, 83 Ind. 457; *Denbo v. Wright*, 53 Ind. 226.

25, *Taylor v. Bunker*, 68 Mich. 258; *Heyne v. Doerfler*, 124 N. Y. 505; *Hutchinson v. Cleary*, 3 N. Dak. 270.

26, *Waterman Real Estate Ex. v. Stephens*, 71 Mich. 104; *Marsh v. Gilbert*, 2 Redf. (N. Y.) 465; *Smith v. James*, 72 Iowa 515; *Hildebrandt v. Crawford*, 65 N. Y. 107.

27, *Watts v. Warren*, 108 N. C. 514; *Farmers' & Traders' Bank v. Creveling*, 84 Iowa 677.

28, *Allen v. Jones*, 1 Ind. App. 63, by Indiana statute.

29, *Roche v. Ware*, 71 Cal. 275; 60 Am. Rep. 539; *Kee-ner v. Zartman*, 144 Pa. St. 179; *Alling v. Brazee*, 27 Ill. App. 595; *Strickland v. Wynn*, 51 Ga. 600; *Lewis v. Maginniss*, 30 Fla. 419; *Dysart v. Furrow*, 90 Iowa 59. See also, *Cargill v. Atwood*, 18 R. I. 303.

30, *Lane v. Rogers*, 113 N. C. 171.

31, *Johnson v. Dexter*, 37 Vt. 641.

32, *Krumrine v. Grenoble*, 165 Pa. St. 98.

§ 795. **Further applications of the rule.**— While it has been held that these statutes *apply to all civil actions and proceedings*,¹ including those to *probate a will*, as well as actions arising in tort or on contract,² yet *proponents* and *beneficiaries* are not as a rule disqualified to testify as to the *execution of a will or the genuineness of the signature*, for, while the making of the will is a transaction, it is not such a transaction with these persons as will make them incompetent witnesses. The proceedings for the probate of a will are in their nature *ex parte*.³ A beneficiary is a competent witness as to the *capacity of a deceased* person to make a will;⁴ the wife of a legatee is also competent to testify to the mental condition of the deceased.⁵ But such testimony must be based on personal observation and not on any transactions or communications had with the deceased.⁶ *One who would inherit*, but for the will, cannot testify against the testator's capacity to make a will;⁷ one with such an interest may, however, testify as to declarations of the deceased to the effect that he has made a will devising property to the witness.⁸ So an heir is incompetent to testify to the want of capacity of his father to make a deed, but

for which he would inherit the property in question.⁹ The *proponent of a will*, who is the principal beneficiary, cannot, in order to show the capacity of the testator, testify as to what took place between the testator and himself when the will was executed.¹⁰ Any one rendered incompetent by interest may remove this disability by executing a release of all claims to the property in question.¹¹ As a general rule, *co-parties to an action* are incompetent to testify against a representative of a deceased or incompetent person as to transactions or communications with such person concerning the subject matter of the controversy;¹² nor can one who is a co-defendant with the representative testify as to conversations with the deceased or incompetent person.¹³ It has, however, been held by the supreme court of Georgia that a co-defendant is competent as to transactions of the adverse party and the deceased.¹⁴ A co-party cannot remove the disqualifying interest and make himself competent by allowing judgment to be taken against him by default,¹⁵ but this rule does not prevent the adverse party from testifying against the survivors, where one of several co-defendants is dead.¹⁶ It has also been held that a surviving co-surety may testify for himself as well as for his co-defendant.¹⁷ But, if the survivor has an interest adverse to the estate of his deceased co-party, he is an adverse party within the meaning

of the statute and not competent as to transactions with his deceased co-party.¹⁸ When the relation of *trustee and cestui que trust* exists, it has been held that one of two *cestuis que trust* may testify for the others, against the deceased trustee's representative, as to declarations made by the deceased trustee.¹⁹ Further applications of this rule of law will be found by reference to the cases cited below.²⁰

1, McBride's Appeal, 72 Pa. St. 480.

2, Welch v. Adams, 63 N. H. 344; 56 Am. Rep. 521 and note and cases there cited.

3, Martin v. McAdams, 87 Tex. 225; Loder v. Whelpley, 111 N. Y. 239; Snider v. Burks, 84 Ala. 53; Gavern's Adm. v. Williams, 50 Mo. 206.

4, Foster's Ex. v. Dickerson, 64 Vt. 233; Sim v. Russell, 90 Iowa 656; Straser v. Hogan, 120 Ind. 207; Williams' Ex. v. Williams, 90 Ky. 28. Contra, *In re Eysa-man's Will*, 113 N. Y. 62.

5, Denning v. Butcher, (Iowa) 59 N. W. Rep. 69.

6, Loder v. Whelpley, 111 N. Y. 239. Contra, Goldthorp v. Goldthorp, (Iowa) 62 N. W. Rep. 845; Snider v. Burks, 84 Ala. 53.

7, Kerr v. Lunsford, 31 W. Va. 659; Brace v. Black, 125 Ill. 33. *In re Dunham's Will*, 121 N. Y. 575.

8, *In re Lambie's Estate*, 97 Mich. 49.

9, Crothers v. Crothers, 149 Pa. St. 201.

10, Goerke v. Goerke, 80 Wis. 516.

11, Loder v. Whelpley, 111 N. Y. 239.

12, Whitmer v. Rucker, 71 Ill. 410; James v. James, 81 Tex. 373; Mead v. Weaver, 42 Neb. 149.

13, Sublett v. Hodges, 88 Ala. 491.

14, New Ebenezer Assn. v. Grass Lumber Co., 89 Ga. 125.

15, *Moore v. Schofield*, 96 Cal. 486. See also, *Baker v. Jerome*, 50 Ohio St. 682.

16, *North Georgia Mining Co. v. Latimer*, 51 Ga. 47.

17, *Wolf v. Madden*, 82 Iowa 114.

18, *Wilcox v. Corwin*, 117 N. Y. 500; *Williams v. Mover*, 29 S. C. 332.

19, *Beach v. Cummings*, (Ky.) 18 S. W. Rep. 360.

20, *Strong v. Dean*, 55 Barb. (N. Y.) 337; *Reed v. Reed*, 30 Ind. 313; *Halyburton v. Dobson*, 65 N. C. 88; *Karns v. Tanner*, 66 Pa. St. 297; *Sherlock v. Alling*, 44 Ind. 184; *Field v. Brown*, 24 Gratt. (Va.) 74; *Key v. Jones*, 52 Ala. 238; *Canaday v. Johnson*, 40 Iowa 587; *Wood v. Stafford*, 50 Miss. 370; *Mosner v. Raulain*, 66 Barb. (N. Y.) 313; *Koenig v. Katz*, 37 Wis. 153; *Connelly v. Dunn*, 73 Ill. 218; *Lewis v. Fort*, 75 N. C. 251; *Hinckley v. Hinckley*, 79 Me. 320; *Barnes v. Dow*, 59 Vt. 530; *Wertz v. Merritt*, 74 Iowa 683; *Seligman v. Estate*, 60 Mich. 267; *Rainwater v. Harris*, 51 Ark. 401; *Cleft v. Moses*, 112 N. Y. 426; *Hodges v. Denny*, 86 Ala. 226; *Armfield v. Colvert*, 103 N. C. 147; *Duffield v. Hue*, 136 Pa. St. 602; *Gage v. Phillips*, 21 Nev. 150; *Robinson v. James*, 29 W. Va. 224; *Sallade v. Gerlach*, 132 N. Y. 548; *Randall's Adm. v. Randall*, 64 Vt. 419; *Campbell Banking Co. v. Cole*, 89 Iowa 211; *Lloyd v. Holtenback*, 98 Mich. 203.

1796. Mode of ascertaining competency of witnesses — Voir dire.—We have already seen that large classes of witnesses, who may now testify, were wholly incompetent before the passage of enabling statutes. Under the former rigid rules, when any question of competency was raised, it was deemed highly important to ascertain, before the examination of a witness in chief, whether he was competent or incompetent. To settle this question, it was the custom to examine

the proposed witness on his *voir dire*, as it was called. In this preliminary examination, he was duly sworn to answer as to his competency.¹ The most common illustration of the practice was in those cases where it was claimed that the witness was incompetent on the ground of interest, but the same method was adopted where the disqualification depended upon other grounds.² Under the old practice, the person objecting could either examine the proposed witness on his *voir dire*, or he could call *witnesses to prove the disqualification*.³ But it was held that the objector could not resort to both methods of proof. It was urged that, by appealing to the conscience of the witness, the party offered him as a credible witness, and could not afterwards say that he was unworthy of credit.⁴ It was sometimes held, however, that neither mode of proof was exclusive.⁵ It is now a common practice to wait until the witness is sworn in chief, and then to *examine him as to his competency*, if any such examination is necessary.⁶ Although the other practice now generally prevails, it would seem a proper exercise of discretion to allow the examination on the *voir dire*.⁷ Although it was formerly held that, unless the proof of incompetency was made on the *voir dire*, the objection was waived,⁸ it is now well settled that the *objection to competency may be raised at any time* during the examination or cross-exami-

nation of a witness, with the qualification that it should be made as soon as discovered.⁹ If it is not made upon discovery, it is *waived*.¹⁰ If the incompetency is known, the objection should be made before the examination-in-chief.¹¹

1, *Dewdney v. Palmer*, 4 M. & W. 664; *Mifflin v. Bingham*, 1 Dall. (Pa.) 272; *Yardley v. Arnold*, 10 M. & W. 141; *Doe v. Webster*, 12 Adol. & Ell. 442.

2, *Shannon v. Com.*, 8 Serg. & R. (Pa.) 444; *Galbraith v. Galbraith*, 6 Watts (Pa.) 112; *Bank of Columbia v. Magruder*, 6 Har. & J. (Md.) 172; 14 Am. Dec. 271; *Seely v. Engell*, 13 N. Y. 542, where the objection was that the witness was the wife of the real party in interest. *Best Ev. sec. 133*; *Greenl. Ev. sec. 423*.

3, See cases next cited.

4, *Bridge v. Wellington*, 1 Mass. 219; *Mifflin v. Bingham*, 1 Dall. (Pa.) 272; *Chance v. Hine*, 6 Conn. 231; *Stuart v. Lake*, 33 Me. 87; *Schnader v. Schnader*, 26 Pa. St. 384; *Doer v. Osgood*, 2 Tyler (Vt.) 28; *McAllister v. Williams*, 1 Overt. (Tenn.) 107; *Walker v. Collier*, 37 Ill. 362; *Greenl. Ev. sec. 423*.

5, *Stebbins v. Sackett*, 5 Conn. 258.

6, *Jacobs v. Layborn*, 11 M. & W. 685.

7, *Seely v. Engell*, 13 N. Y. 542, where it was held to be the *right* of the objecting party; *Fifield v. Smith*, 21 Me. 383; *Smith v. Fairbanks*, 27 N. H. 521; *Bridge v. Wellington*, 1 Mass. 219; *Stebbins v. Sackett*, 5 Conn. 258; *Foley v. Mason*, 6 Md. 37; *Wright v. Mathews*, 2 Blackf. (Ind.) 187; *Walker v. Collier*, 37 Ill. 362; *Harrel v. State*, 1 Head (Tenn.) 125; *Tarleton v. Johnson*, 25 Ala. 300; 60 Am. Dec. 515; *Weigel's Succession*, 18 La. An. 49; *Hooker v. Johnson*, 6 Fla. 730.

8, *Dewdney v. Palmer*, 4 M. & W. 664.

6, Seely v. Engell, 13 N. Y. 542; Carter v. Graves, 7 Miss. 9; Swift v. Dean, 6 Johns. 523; Andre v. Bodman, 13 Md. 241; 71 Am. Dec. 628; Fisher v. Willard, 13 Mass. 379; Brooks v. Crosby, 22 Cal. 42; Sheridan v. Medara, 10 N. J. Eq. 469; 64 Am. Dec. 464.

10, Drake v. Foster, 28 Ala. 649; Lewis v. Morse, 20 Conn. 211; Kingsbury v. Buchanan, 11 Iowa 387; Stuart v. Lake, 33 Me. 87; Groshon v. Thomas, 20 Md. 234; Heely v. Barnes, 4 Den. 73.

11, Donelson v. Taylor, 8 Pick. 390; Howser v. Com., 51 Pa. St. 332.

CHAPTER 21.

ATTENDANCE AND EXAMINATION OF WITNESSES.

- § 797. Attendance of witnesses — Subpœna.
- § 798. Fees of witnesses.
- § 799. Mode of compelling attendance.
- § 800. Refusal to testify.
- § 801. Production of books and papers — *Subpœna duces tecum*.
- § 802. Who may be compelled to produce documents.
- § 803. Practice where a witness is confined — Writ of *habeas corpus ad testificandum*.
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- § 832. Collateral questions — Judicial discretion.
- § 833. Same, continued.
- § 834. Questions as to former conviction or indict-
ment.
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- § 836. Questions not affecting credibility, but
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- § 840. Same — Such questions admissible when material to the issue.
- § 841. Same — Where question calls for immaterial facts.
- § 842. View that the matter rests in the discretion of the trial judge.
- § 843. Same — Illustrations of the exclusion of such questions.
- § 844. Cross-examination of party.
- § 845. Same — In criminal cases.
- § 846. Actions where the chastity of women is in issue.

§ 797. **Attendance of witnesses— Subpœna.**— The duty of citizens to appear and testify to such facts within their knowledge, as may be necessary to the due administration of justice, is one which has been recognized and enforced by the common law from an early period.¹ The process by which this writ is enforced is the *subpœna ad testificandum*, commonly called a *subpœna*, which commands the witness to appear at the trial to give his testimony. Under the old practice, the subpœna named the penalty imposed by law for failing to appear.² The right to compel the attendance of witnesses was an incident to the jurisdiction of the common law courts; and statutes quite generally exist extending this power to other officers, such as referees, arbitrators and the like; and the same power is sometimes conferred upon municipal corporations.³ Formerly the subpœna was *served* upon the witness by leaving with him a copy, or a notice or ticket containing

the substance of the writ itself,⁴ but modern statutes frequently provide that the service may be made by leaving a copy with the witness, or by reading the subpoena to him, or by leaving a copy at the place of his abode.⁵ In *the federal courts*, subpoenas for witnesses in any district may run into any other district, provided that, in civil cases, the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.⁶ In the state courts, although the statutes generally allow the taking of depositions of witnesses residing beyond some prescribed distance, the subpoena runs to the boundaries of the state; and witnesses residing within the state may be compelled to attend. But statutes frequently limit the distance which witnesses may be compelled to travel to attend as witnesses in justice courts.⁷ Either party to a suit has the right to a process of court to secure the attendance of witnesses to testify in his behalf in any judicial proceeding. It is reversible error to limit the number of subpoenas to which a party is entitled, when on trial for such an offense as murder.⁸

1, *Amry v. Long*, 9 East 484.

2, *Phill. Ev.* (3rd ed.) 370. For full discussion, see 24 *Am. & Eng. Ency. Law* tit. Subpoena.

3. See the statutes of the jurisdiction. As to the power of congress and legislative bodies to compel the attendance

of witnesses, see, *Kilbourn v. Thompson*, 103 U. S. 168; *Burnham v. Morrissey*, 14 Gray 226; 74 Am. Dec. 676.

4, 2 Phill. Ev. (3rd ed.) 373; Cowen & Hill's notes to 2 Phill. Ev. note 312.

5, The statutes of the jurisdiction should be consulted.

6, Rev. Stat. U. S. 876. As to depositions, see sec. 655 *supra*. The distance is to be estimated by the usual routes of travel, *Ex parte Beebees*, 2 Wall. Jr. (U. S.) 127. If the witness lives without the district, travel fees can be collected for no more than the one hundred miles, *Anonymous*, 5 Blatch. (U. S.) 134; *The Leo*, 5 Ben. (U. S.) 486; *The Syracuse*, 36 Fed. Rep. 830. But the rule is otherwise, if he resides within the district, *Sims v. Schult*, 40 Fed. Rep. 143; *In re Williams*, 37 Fed. Rep. 325.

7, See the statutes of the jurisdiction. Travel fees cannot be charged for distances beyond the line of the state, *Kingfield v. Pullen*, 54 Me. 398; *Crawford v. Abraham*, 2 Ore. 163. *Contra*, *Dutcher v. Justices*, 38 Ga. 214.

8, *State v. Gideon*, 119 Mo. 94; *Aikin v. State*, 58 Ark. 544.

§ 798. Fees of witnesses. — By an early English statute, witnesses were entitled to their "reasonable costs and charges."¹ In this country, the subject is generally regulated by statutes which prescribe the rate of compensation for each day's attendance and the rate of mileage.² Witnesses are *not compelled* to attend or to testify in civil cases, *unless their fees are paid or tendered* in advance,³ although, of course, such payment or tender may be *waived* by the words or conduct of the person subpoenaed.⁴ At the close of each day, if the fees of the witness for the

next day are not paid, he has the right to return home,⁵ but, if the case is not terminated, he should first give notice of such intention to the party who subpoenaed him or to his attorney.⁶ If a person has attended as a witness in good faith, he is entitled to his fees, although *not subpoenaed*.⁷ So one who is required to attend as a witness is entitled to his fees, although *not examined*,⁸ or although found to be incompetent to testify,⁹ or although his deposition is taken.¹⁰ If a person is subpoenaed as a witness in *several causes* at the same time and place, he is entitled to compensation in each case.¹¹ But, at least in the federal courts, if the causes are between the same parties, a different rule prevails, and only one travel fee and one per diem compensation is allowed.¹² The subpoena should be served in such manner that the witness may have a *reasonable time* in which to prepare to attend court; and he is entitled to use the ordinary modes of conveyance.¹³ But, if a person is present in court, he may be called as a witness, although no subpoena has been served upon him or no prior notice given.

1, 5 Eliz. ch. 9.

2, See the statutes of the jurisdiction.

3, Chamberlain's Case, 4 Cow. 49; Ogden v. Gibbons, 5 N. J. L. 518; Atwood v. Scott, 99 Mass. 177; 96 Am. Dec. 726; Beaulieu v. Parsons, 2 Minn. 37; Mattock v. Whea-

ton, 10 Vt. 493; Bliss v. Brainard, 42 N. H. 255; Kipp v. Dawson, 59 Minn. 82, where the witness was in court, but had not been subpoenaed. The rule is otherwise in criminal cases, Chamberlain's Case, 4 Cow. 49; West v. State, 1 Wis. 209. See also, Rozek v. Redzinski, 87 Wis. 52, where a party was compelled to testify without the payment of his fees.

4, Goff v. Mills, 2 Dowl. & L. 23; Hurd v. Swan, 4 Den. 75; Newton v. Harland, 1 Man. & G. 956; Betteley v. McLeod, 3 Bing. N. C. 405; Rozek v. Redzinski, 87 Wis. 525.

5, Atwood v. Scott, 99 Mass. 177; 96 Am. Dec. 728; Courtney v. Baker, 3 Den. 27.

6, Bliss v. Brainard, 42 N. H. 255. See also cases last cited.

7, United States v. Williams, 1 Cranch C. C. 178; Dennis v. Eddy, 12 Blatch. (U. S.) 195; Prouty v. Draper, 2 Story (U. S.) 199; Price v. McGee, 1 Brev. (S. C.) 455; Vence v. Speir, 18 How. Pr. (N. Y.) 168; Pinson v. Atchison Ry. Co., 54 Fed. Rep. 464; Burrow v. Kansas City Ry. Co., 54 Fed. Rep. 278. But see, Hopkins v. Waterhouse, 2 Verg. (Tenn.) 230; Sapp v. King, 66 Tex. 570.

8, Leigh v. Hodges, 4 Ill. 15; Hutchins v. Eden, 3 Hen. & M. (Md.) 101; De Benneville v. De Benneville, 1 Binn. (Pa.) 46.

9, Gray v. Alexander, 7 Humph. (Tenn.) 16.

10, Anderson v. Moe, 1 Abb. (U. S.) 299.

11, Flores v. Shorn, 8 Tex. 377; House v. Barber, 10 Vt. 158; Robison v. Banks, 17 Ga. 211; Findley v. Wyser, 1 Stew. (Ala.) 23; O'Kane v. People, 46 Ill. App. 225.

12, Rev. Stat. U. S. sec. 848. Contra, Hicks v. Brennan, 10 Abb. Pr. (N. Y.) 304; Vence v. Speir, 18 How. Pr. (N. Y.) 168. Where the witness is subpoenaed by both parties he is entitled to fees from both, Peace v. Person, 1 Murph. (N. C.) 188. Contra, Renfro v. Kelly, 10 Ala. 338.

13, Hammond v. Stuart, 1 Strange 509; Wilkie v. Chadwick, 13 Wend. 49. As to what is reasonable time, see, Barber v. Wood, 2 Moody & Rob. 172.

§ 799. Mode of compelling attendance.

It is indispensable to the due administration of justice that the court should have the power of summarily compelling the attendance of witnesses; and "every court, having power definitely to hear and determine any suit, has, by the common law, inherent power to call for all adequate proofs of the facts in controversy, and, to that end, to summon and *compel the attendance* of witnesses before it."¹ The mode of compelling attendance of a witness, who wilfully neglects to attend, is by attachment for *contempt* of court.² But, before such proceedings can be had, it must be shown to the court that the *subpoena* has been *properly and seasonably served*;³ and, in civil cases, that the *fees* of the witness have been *paid* or tendered,⁴ or that such payment has been waived.⁵ It must also appear that the testimony proposed is *material* to the case.⁶ The duty of attending as a witness is paramount to the ordinary business engagements or affairs of life, or to the commands of a master.⁷ Hence, the process of subpoena demands, on the part of the witness, extraordinary *efforts to obey*. Mere insolvency or poverty is no excuse, since the law provides for the payment of fees in advance.⁸ Although serious *sickness* of the witness or in his family, such as would prevent a prudent person from leaving home on important business, may save him from the imputation of

contempt, yet such sickness must be clearly shown, when urged as an excuse in a proceeding for contempt.⁹ While witnesses are not bound to endanger life in attending court,¹⁰ yet the fact that such attendance would cause great *personal inconvenience*,¹¹ or would compel the witness to travel a greater distance per day than is usual or convenient¹² would not afford an excuse. Although a wilful disregard of the command of the subpoena is necessary to constitute *contempt*, this may be *inferred* from the failure to obey it, when no satisfactory excuse is shown.¹³ It is no such excuse that the witness deems his *testimony immaterial* to the issue, as it would not be tolerated that a witness should assume to determine that question.¹⁴ Of course, if the witness has been *excused*, or *given leave of absence* by the party summoning him or his attorney, or is led to suppose that he need not attend by the person managing the case, he should not be punished for contempt.¹⁵ The courts have frequently punished for contempt those who have procured the absence of witnesses or in other ways prevented them from testifying at the trial of the cause.¹⁶

1, Greenl. Ev. sec. 309. See article on attendance of witnesses at common law, 1 Law Rev. 284.

2, *Ex parte* Humphrey, 2 Blatch. (U. S.) 228; *Ex parte* Beebees, 2 Wall. Jr. (U. S.) 127; Green v. State, 17 Fla. 669; Burnham v. Morrissey, 14 Gray 226; 74 Am. Dec. 676; Wilson v. State, 57 Ind. 71; State v. Trumbull, 4 N.

J. L. 139; Stephens v. People, 19 N. Y. 549; Respublica v. Duane, 4 Yeates (Pa.) 347.

3, Scholes v. Hilton, 10 M. & W. 15; Hill v. Dolt, 7 DeGex., M. & G. 397.

4, Brocas v. Lloyd, 23 Beav. 129; Newton v. Harland, 1 Man. & G. 956; Betteley v. McLeod, 3 Bing. N. C. 405; *In re* Thomas, 1 Dill. (U. S.) 420; Ogden v. Gibbons, 5 N. J. L. 518; Beaulieu v. Parsons, 2 Minn. 37; Mattocks v. Wheaton, 10 Vt. 493.

5, Goff v. Mills, 2 Dowl. & L. 23.

6, Chapman v. Davis, 3 Man. & G. 609; 4 Scott N. R. 319. See next section.

7, Goff v. Mills, 2 Dowl. & L. 23.

8, People v. Davis, 15 Wend. 603.

9, People v. Davis, 15 Wend. 603.

10, Jackson v. Perkins, 2 Wend. 308.

11, Pipher v. Lodge, 16 Serg. & R. (Pa.) 214.

12, Wilkie v. Chadwick, 13 Wend. 49. Of course, the witness should be allowed time to use the usual modes of travel; nor can he be compelled to travel on Sunday, Wilkie v. Chadwick, 13 Wend. 49.

13, Jackson v. Seager, 2 Dowl. & L. 13.

14, Chapman v. Davis, 3 Man. & G. 609; 4 Scott N. R. 319; Scholes v. Hilton, 10 M. & W. 16. However, where the neglect was that of Lord Brougham and Lord John Russell, the English courts regarded the question of immateriality as important, Dicas v. Lawson, 1 Cromp. M. & R. 934; R. v. Russell, 7 Dowl. 693.

15, Farrah v. Keat, 6 Dowl. 470; State v. Nixon, Wright (Ohio) 763.

16, Montgomery v. Palmer, 100 Mich. 436, *In re* Whetstone, 9 Utah 156; Savin's case, 131 U. S. 267. See also, Todd v. United States, 158, U. S. 278. where it is held that a preliminary examination before a commissioner does not come within the rule.

§ 800. **Refusal to testify.**—The refusal of a witness to be sworn, except in those cases where the statute allows an affirmation or some other substitute for the oath,¹ or his refusal to testify, after being sworn, is such an obstruction of justice as to subject the wrong-doer to *punishment for contempt*.² Although the court will not compel the witness to answer, unless the question is deemed *material and relevant*,³ yet, this is not a question that may be determined by the witness; and the witness must answer, if the question is held to be material and relevant by the court.⁴ Although the power to punish for contempt is inherent in courts and necessary to the exercise of all other powers,⁵ there is no such power, unless the court has jurisdiction of the case.⁶

1, *Ex parte Fernandez*, 10 C. B. N. S. 3; *Ex parte Roelker*, 1 Sprague (U. S.) 276; *Ex parte Walker*, 25 Ala. 81; *Ex parte Langdon*, 25 Vt. 680; *in re Spofford*, 62 Fed. Rep. 443; *Ex parte Stice*, 70 Cal. 51, where it was held no excuse that the witness feared his evidence would subject him to punishment for a felony.

2, *Holman v. Austin*, 34 Tex. 668; *Ragland v. Wickware*, 4 J. J. Marsh. (Ky.) 530; *United States v. Coolidge*, 2 Gall. (U. S.) 364. See note, 13 L. R. A. 66.

3, *Ragland v. Wickware*, 4 J. J. Marsh. (Ky.) 530.

4, *People v. Cassels*, 5 Hill 165; *Bradley v. Veazie*, 47 Me. 85; *Ex parte McKee*, 18 Mo. 599.

5, *United States v. Hudson*, 7 Cranch 32; *United States v. New Bedford Bridge*, 1 Wood. & M. (U. S.) 401.

6, *Ex parte Peck*, 3 Blatch. (U. S.) 113; *Matter of Moron*, 10 Mich. 208; *Holman v. Austin*, 34 Tex. 668. In

some cases it is held that the witness cannot raise the question of jurisdiction in this collateral manner, *In re Abeles*, 12 Kan. 451.

§ 801. **Production of books and papers**
— Subpoena duces tecum.— When it is necessary, not only to secure the oral testimony of the witness, but also the production of books or writings in his possession, the writ contains, in addition to the ordinary command to appear, a requirement that the witness bring with him such document or documents, designating the same. Such a subpoena is called a *subpoena duces tecum*.¹ In former practice, the writ was used only where the papers were in the possession of some third person; but now the statutes are frequently broad enough to embrace parties to the litigation, and to compel them also to produce papers in their possession.² This is an ancient writ which has been in use since the time of Charles II., as incidental to the power of courts and necessary to the due administration of justice.³ It is a writ of compulsory obligation which the *witness must obey* like other subpoenas. He has no more right to determine whether the documents shall be produced, than whether he shall appear as a witness. It is his duty to attend and to bring with him the documents according to the exigency of the writ.⁴ It is for the court to determine whether the documents are *admissible*,⁵ or whether they should be pro-

duced and exhibited.⁶ Thus, the court will determine whether the documents should be withheld as evidence on the ground that they will deprive the witness of his *title*,⁷ or subject him to a penalty or a *criminal charge*,⁸ or whether the document is in the nature of a *confidential communication* to an attorney,⁹ or whether his excuse for not producing the same is valid or reasonable.¹⁰ So the court will *punish* the witness for his failure or *refusal* to produce documents, if properly subpoenaed, in case he has no excuse for such failure or refusal.¹¹ The writ should describe the papers to be produced with such certainty that the witness may know what papers are called for;¹² for example, a command to produce "all papers touching or concerning the matters in dispute" has been held insufficient.¹³ A *subpoena duces tecum* is only to be employed to secure the production of books and papers that are to be introduced in evidence in the trial of an action; it is not to be used to secure papers to *refresh the memory* of a witness.¹⁴

1, 3 Bl. Comm. 382. As to inspection of books and papers, see secs. 727 *et seq. supra*. See note, 32 Am. St. Rep. 643-648.

2, See the statutes of the jurisdiction. *Murray v. Elston* 23 N. J. Eq. 212; *Mitchell's Case*, 12 Abb. Pr. (N. Y.) 249; *Hauseman v. Sterling*, 61 Barb. (N. Y.) 347; *Smith v. McDonald*, 50 How. Pr. (N. Y.) 519.

3, *Amey v. Long*, 9 East 483. See also, *Barnes' Case*, reviewed in 5 South. Law Rev. (N. S.) 475.

4, Doe v. Kelly, 4 Dowl. 273; R. v. Russell, 7 Dowl. 693; Bull v. Loveland, 10 Pick. 9.

5, Amey v. Long, 9 East 483; Bull v. Loveland, 10 Pick. 9; Holtz v. Schmidt, 2 Jones & Sp. (N. Y.) 28; Chaplain v. Briscoe, 13 Miss. 198; Sherman v. Barrett, 1 McMull. (S. C.) 147.

6, Amey v. Long, 9 East 475; R. v. Dixon, 3 Burr. 1687; Bonesteel v. Lynde, 8 How. Pr. (N. Y.) 226.

7, Miles v. Dawson, 1 Esp. 405; Bull v. Loveland, 10 Pick. 9.

8, United States v. Reyburn, 6 Peters 352.

9, R. v. Dixon, 3 Burr. 1687; Copeland v. Watts, 1 Stark. 95; Durkee v. Leland, 4 Vt. 612.

10, Bull v. Loveland, 10 Pick. 9; Chaplain v. Briscoe, 13 Miss. 198; Lane v. Cole, 12 Barb. (N. Y.) 680.

11, Bonesteel v. Lynde, 8 How. Pr. (N. Y.) 226; United States Exp. Co. v. Henderson, 69 Iowa 40.

12, United States v. Babcock, 3 Dill. (U. S.) 566; *In re* O'Toole, 1 Tuck. (N. Y.) 39. See also, *In re* Storrer, 63 Fed. Rep. 564.

13, *Ex parte* Brown, 7 Mo. App. 494; 72 Mo. 83; 37 Am. Rep. 426; United States v. Hunter, 15 Fed. Rep. 712; State v. Davis, 117 Mo. 614. See also, United States v. Babcock, 3 Dill. (U. S.) 566. *In re* Dunn 9 Mo. App. 255.

14, United States v. Tilden, 10 Ben. (U. S.) 566, 570. As to refreshing memory, see secs. 877 *et seq. infra*.

§ 802. Who may be compelled to produce documents.—Obviously a witness cannot be compelled to produce documents by the *subpoena duces tecum*, unless such documents are under his control or possession. Thus, a mere clerk in a bank is under no obligation to produce its books, when they are under the control of the cashier.¹ But one

having the *actual custody* of documents may be compelled to produce them, although they are owned by others.² It has sometimes been held that the *officers of a corporation* will not be compelled by a *subpoena duces tecum* to produce in court the books of the corporation,³ but the better reasoning sustains the view that a corporation is under the same obligation to furnish testimony relevant to the issue as are other persons;⁴ and, in the state of New York, where the courts declined to compel corporations to produce documents in controversies between third persons on a *subpoena duces tecum*, a statute was adopted changing the rule which the courts had declared.⁵ It should appear, however, that the documents are in the custody or control of the officer summoned to produce them.⁶ Statutes quite generally provide that duly *certified copies of the records of public corporations* may be received in evidence. The entire public may be said to be interested in corporations of this class; and it would lead to unnecessary inconvenience, if the public officers were compelled to produce such records at all times and places in obedience to a *subpoena duces tecum*.⁷ In the *federal courts*, the writ is confined to papers, written documents and books; and does not extend to models or patterns.⁸ If a *witness is in court* and has documents with him relevant to the issue, he may be compelled to produce

them, although no *subpoena duces tecum* has been served.⁹ When the documents are produced in obedience to a *subpoena duces tecum*, the person calling the witness is under no obligation to have the witness sworn.¹⁰

1, Bank of Utica v. Hillard, 5 Cow. 154; United States Exp. Co. v. Henderson, 69 Iowa 40, same rule in the case of other corporations; Crowther v. Appleby, L. R. 9 C. P. 27, so held as to the secretary and solicitor of a railway company, as he was only the employee of the directors.

2, Amey v. Long, 1 Camp, 17; Corsen v. Dubois, 1 Holt 239.

3, LeFarge v. LeFarge Ins. Co., 14 How. Pr. (N. Y.) 26; Central Bank v. White, 37 N. Y. S. 297; Morgan v. Morgan, 16 Abb. Pr. N. S. (N. Y.) 291.

4, Wertheim v. Continental Ry. & T. Co., 15 Fed. Rep. 716. See cases cited in note 1 above.

5, N. Y. Code sec. 868.

6, United States v. Tilden, 10 Ben. (U. S.) 566; 18 Alb. L. Jour. 416.

7, R. v. Russell, 7 Dowl. 693; Corbett v. Gibson, 16 Blatch. (U. S.) 334; Delaney v. Regulators, 1 Yeates (Pa.) 403; Gray v. Pentland, 2 Serg. & R. (Pa.) 23; Morris v. Creel, 2 Va. Cas. 49; *In re Lester*, 77 Ga. 143, the mayor of the city is not required to produce docket of police court. See secs. 526 *et seq. supra*.

8, *In re Shepard*, 3 Fed. Rep. 12, where it was held that stove patterns were not within the meaning of the statute.

9, Boynton v. Boynton, 25 How. Pr. (N. Y.) 490.

10, Perry v. Gibson, 1 Adol. & Ell. 48; Summers v. Moseley, 2 Cromp. & M. 477; Sherman v. Barrett, 1 McMull. (S. C.) 163; Martin v. Williams, 18 Ala. 190. But see, Murray v. Elston, 23 N. J. Eq. 212. But the witness may be sworn, if he desires to show that the writing is not material, Alkin v. Martin, 11 Paige (N. Y.) 499.

§ 803. Practice where a witness is confined—Writ of habeas corpus ad testificandum.—If a witness, whose testimony is material, is confined in a prison or jail, his attendance is secured by means of the writ known as *habeas corpus ad testificandum*.¹ This is a command from the court directed to the person having the prisoner in custody to bring the person so detained before the court to testify in the cause at a given time and place.² The application for this writ is made, by the party desiring the testimony, to the judge at chambers or in open court by an affidavit or petition showing that the witness is a material witness, and also the fact of his detention.³ The granting of the writ is *discretionary* with the court; and it will not be issued if, in the opinion of the court, the application is not in good faith.⁴ The writ will protect the officer and must be obeyed, if issued, although irregular in form,⁵ or collusively obtained.⁶ The writ may be allowed *in favor of a party* himself, if he is entitled to testify;⁷ and it may be used to obtain the testimony of one imprisoned in a civil, as well as in a criminal case,⁸ or to secure the attendance of one confined as a *lunatic*.⁹ Since statutes have been enacted allowing *those convicted of felonies* to testify, the attendance of such persons may be procured by this mode; but it was held in Missouri that statutes prohibiting the pro-

duction, on *habeas corpus*, of any person as a witness who was under sentence for felony was constitutional, although the person was a competent witness.¹⁰

1, R. v. Roddam, Cowp. 672; State v. Kennedy, 20 Iowa 372; *Ex parte* Marmaduke, 91 Mo. 228; 60 Am. Rep. 250; People v. Willard, 92 Cal. 482; State v. Adair, 68 N. C. 68; 3 Bl. Comm. 130.

2, See cases last cited.

3, R. v. Roddam, Cowp. 672. See also, Cowen & Hill's Notes to 2 Phill. Ev. (3d ed.) notes 329-338.

4, R. v. Burbage, 3 Burr. 1440; Roberts v. State, 94 Ga. 66. See also, Thelluson v. Coppinger, 3 Esp. 283.

5, Wattles v. Marsh, 5 Cow. 176; *In re* Price, 4 East 587.

6, Hassam v. Griffin, 18 Johns. 48; 9 Am. Dec. 184.

7, *Ex parte* Cobbett, 4 Jur. N. S. 145.

8, Noble v. Smith, 5 Johns. 357.

9, Fennell v. Tait, 1 Crompt., M. & R. 584.

10, *Ex parte* Marmaduke, 91 Mo. 228; 60 Am. Rep. 250. But see, State v. Adair, 68 N. C. 68.

§ 804. Recognizance by witnesses.—In criminal cases, witnesses for the government, whom the court may deem material, may be required to give a *recognizance for their appearance* to give testimony at the trial; and, in default of such recognizance, they may be *committed*.¹ But such committal cannot be ordered merely on *ex parte* affidavits.² In the discretion of the court, *sureties may be required* on such a recognizance,³ although it

was held at common law that, if sureties could not be obtained by the witness, his own recognizance must be taken.⁴ Statutes sometimes provide that, if witnesses, who are required to recognize with or without sureties, refuse, they may be committed until they comply with the order or are discharged.⁵ Such a law does not deprive a witness of his liberty without due process of law in violation of the federal constitution.⁶ But a justice of the peace does not have power to compel such a recognizance in the absence of statute.⁷

1, United States v. Butler, 1 Cranch C. C. 422; *En parte Shaw*, 61 Cal. 58; *Bickley v. Com.*, 2 J. J. Marsh. (Ky.) 572; *State v. Grace*, 18 Minn. 398; *State v. Zellers*, 7 N. J. L. 220; *Means v. State*, 10 Tex. App. 16; *In re Petrie*, 1 Kan. App. 184.

2, *In re Lewellyn*, (Mich.) 62 N. W. Rep. 554.

3, See the cases above cited.

4, *Bennet v. Watson*, 3 Maule & S. 1; *Evans v. Rees*, 12 Adol. & Ell. 55; 2 Hale P. C. 282.

5, Rev. Stat. U. S. sec. 879. The statutes of the jurisdiction should be consulted. In California, in such cases, the deposition of the witness may be taken, *People v. Lee*, 49 Cal. 37.

6, *In re Petrie*, 1 Kan. App. 184.

7, *Clayborn v. Tompkins*, 141 Ind. 19.

1805. Privileged from arrest and service of process.—From a very early period, the common law has recognized the privilege of parties and witnesses in judicial proceedings to go to the place of trial, to remain so

long as necessary and to return home, free from arrest on civil process. This is an immunity conceded to be a necessity in the administration of justice.¹ Witnesses who attend a trial in good faith, as well as parties, are entitled to this privilege, whether such attendance is *voluntary or in obedience to a subpoena*.² The privilege extends, *not only to the actual trial* of the cause, but wherever attendance is a duty, including all proceedings of a judicial nature. Thus, this privilege has been recognized during attendance upon bankruptcy proceedings in their various stages,³ or during attendance before an arbitrator,⁴ or on a reference before a master,⁵ or during attendance upon a *habeas corpus* proceeding,⁶ or the hearing of a motion in the cause,⁷ or proceedings in insolvency,⁸ or during attendance at a criminal court as a prosecutor,⁹ or during the giving a deposition under the order of the court,¹⁰ or before a master in chancery.¹¹ A party or witness is privileged while waiting for the trial of a *cause* which is *adjourned* from day to day because of the sickness of a party.¹² The rule applies with especial force when the witness or party is a *resident of another state*, and is in necessary attendance upon some judicial proceeding.¹³ In some cases, it has been intimated that the rule will be more liberally applied in the case of non-resident witnesses or suitors, and that, in their case, the immunity from the service of civil process is absolute.¹⁴

1, Bacon Abr. tit. Privileges 4, 17, 55; Sell. Prac. 123; 1 Tidd's Prac. 195; Meekins v. Smith, 1 H. Black. 636; Larned v. Griffin, 12 Fed. Rep. 590, and many cases there cited. See notes, 77 Am. Dec. 401-405; 3 L. R. A. 266.

2, Walpole v. Alexander, 3 Doug. 45; Arding v. Flower, 8 T. R. 534; Spence v. Stuart, 3 East 89; *Ex parte* Byne, 1 Ves. & B. 316; May v. Shumway, 16 Gray 86; 77 Am. Dec. 401; Dungan v. Miller, 37 N. J. L. 182; United States v. Edme, 9 Serg. & R. (Pa.) 147; Morris v. Beach, 2 Johns. 294; Thompson's Case, 122 Mass. 428; 23 Am. Rep. 370.

3, *Ex parte* Burt, 2 Mont. D. & D. 666; *Ex parte* Helsby, 1 Dea. & Ch. 16; *Ex parte* Donlevy, 7 Ves. 317; *Ex parte* King, 7 Ves. 312; Matthews v. Tufts, 87 N. Y. 568.

4, Moore v. Booth, 3 Ves. 350; 3 East 89.

5, Vinsent v. Watson, 1 Rich. L. (S. C.) 194.

6, R. v. Blake, 2 Nev. & Man. 312.

7, Bromley v. Holland, 5 Ves. 2.

8, Richards v. Goodson, 2 Va. Cas. 381.

9, Montague v. Harrison, 3 C. B. N. S. 292.

10, United States v. Edme, 9 Serg. & R. (Pa.) 147.

11, Dungan v. Miller, 37 N. J. L. 182.

12, Ellis v. De Garmo, 17 R. I. 715.

13, *In re* Healey, 53 Vt. 694; 38 Am. Rep. 713; Dungan v. Miller, 37 N. J. L. 182; Matthews v. Tufts, 87 N. Y. 568; Ballinger v. Elliott, 72 N. C. 596; Thompson's Case, 122 Mass. 428; 23 Am. Rep. 370; Henegar v. Spangler, 29 Ga. 217; Juneau Bank v. McSpedan, 5 Biss. (U. S.) 64; Plympton v. Winslow, 20 Blatch. (U. S.) 82; Kinne v. Lant, 68 Fed. Rep. 436. See note, 25 L. R. A. 731-738.

14, *In re* Healey, 53 Vt. 694; 38 Am. Rep. 713; Person v. Grier, 66 N. Y. 124; 23 Am. Rep. 35; Norris v. Beach, 2 Johns. 294; Hopkins v. Coburn, 1 Wend. 292; Bridges v. Sheldon, 7 Fed. Rep. 36.

1806. Same—Extent and nature of the privilege.—This immunity extends to

parties and witnesses during their necessary attendance upon the judicial proceedings, and for a reasonable time thereafter, *until they can return home*; and, although the privilege is generally construed strictly, slight delays or deviations from the direct route may be allowed. This is a matter for the determination of the court under all the circumstances.¹ Since the courts would often be embarrassed, if suitors or witnesses, while attending judicial proceedings might be molested with process, the privilege has sometimes been called the privilege of the court, and not that of the individual.² It is clear that *one who violates the privilege* by serving civil process upon a party or witness in the actual or constructive presence of the court is *liable to punishment for contempt* of court.³ On application, the *process may be set aside* and the person arrested may be discharged, when the proper objection is made to the jurisdiction of the court.⁴ In the English cases, the privilege seems to have been limited to cases of arrest;⁵ and in this country, the rule has sometimes been declared that the immunity does not apply when the process is a summons merely.⁶ But in other courts, the contrary view has prevailed. "It is the policy of the law to protect suitors and witnesses from service of process in civil actions, whether the *process* be such as required their arrest, or be *merely in the nature of a sum-*

mons. Service in such cases will be set aside, as well upon general principles, as upon positive law, if there be such."⁷ While the privilege does not furnish immunity from arrest on *criminal process*,⁸ it has been held to extend to a case where a defendant was brought from a neighboring state on a requisition, and found not guilty or discharged, but immediately arrested on a civil process,⁹ or where he comes into the state simply to answer a criminal charge.¹⁰ But it has been held that the privilege does not extend to one accused of a crime who has been released on bail.¹¹ Service cannot be made upon a *foreign corporation* by serving an officer of the corporation who is in the jurisdiction, but privileged because he has been called there as a witness.¹²

1, The following are cases where the privilege was waived by delay or deviation: *Chaffee v. Jones*, 19 Pick. 260, where he went off the direct route on his return home to attend his son's funeral; *Clark v. Grant*, 2 Wend. 257, a delay of two days, after submission, to learn result of suit; *Shults v. Andrews*, 54 How. Pr. (N. Y.) 380, delay of two weeks to attend to business; *Strong v. Dickenson*, 1 M. & W. 488, stopping at a coffee house on business, two hours after court adjourned. The following cases hold that the privilege was not waived: *Salhinger v. Adler*, 2 Rob. (N. Y.) 704, where he simply stopped to speak to the opposite counsel; *Selby v. Hills*, 8 Bing. 166, where he did not return home for two hours after case closed; *Pitt v. Coombes*, 5 Barn. & Adol. 1078, where he did not return home directly; *Lightfoot v. Cameron*, 2 W. Black. 1113, where he stopped to dine in evening, the case being finished early in the day; *Ricketts v. Gurney*, 7 Price 699; *Sidgier v. Birch*, 9 Ves. Jr. 69; *Ex parte Clarke*, 2 Dea. & Ch. 99; *Jacobson v. Wayne Cir.*

Judge, 76 Mich. 234, where he stopped to consult counsel whom he did not find for two days, after the trial ended, and where the summons was in an action for tort, when he had been discharged in a criminal suit.

2, *Cameron v. Lightfoot*, 2 W. Black. 1190. But it is held that the individual may waive the privilege, for example, by giving bail, *Steward v. Howard*, 15 Barb. (N. Y.) 26; *Up-ton v. Harris, Peck* (Tenn.) 414; *Gyer v. Irwin*, 4 Dall. (Pa.) 107, by confessing judgment; *Randall v. Crandall*, 6 Hill. 342, by pleading in bar before demanding the privilege. Contra, *Washburn v. Phelps*, 24 Vt. 506.

3, *Cole v. Hawkins*, Andrews 275; *Strange* 1094; *Child-erson v. Barrett*, 11 East 439; *Blight v. Fisher*, 1 Peters C. C. 41; *Miles v. McCullough*, 1 Binn. (Pa.) 77; *In re Healey*, 53 Vt. 694; 38 Am. Rep. 713; *State v. Buck*, 62 N. H. 670. An improper attempt to deter a witness from tes-tifying is contempt of court, *Savin's Case*, 131 U. S. 267. See note, 38 Am. Rep. 717.

4, *Christian v. Williams*, 35 Mo. App. 297; *Norris v. Beach*, 2 Johns. 294; *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Moletor v. Sinnen*, 76 Wis. 308; 20 Am. St. Rep. 71; *Cameron v. Roberts*, 87 Wis. 291. See note, 16 Am. Dec. 723, where the rule is discussed in those cases where a party is decoyed into the jurisdiction.

5, *Meekins v. Smith*, 1 H. Black. 636; *Arding v. Flower*, 8 T. R. 534; *Spence v. Stuart*, 3 East 89; *Sidgier v. Birch*, 9 Ves. 69; *Ex parte Jackson*, 15 Ves. 117.

6, *Greer v. Young*, 120 Ill. 184.

7, *Rorer Inter St. Law* 26; *Wilson v. Donaldson*, 117 Ind. 356; 10 Am. St. Rep. 48; *Christian v. Williams*, 35 Mo. App. 297; *Norris v. Beach*, 2 Johns. 294; *Person v. Grier*, 66 N. Y. 124; 23 Am. Rep. 35; *Moletor v. Sinnen*, 76 Wis. 308; 20 Am. St. Rep. 71; *Andrews v. Lembeck*, 46 Ohio St. 38; 15 Am. St. Rep. 547; *First National Bank v. Ames*, 39 Minn. 179; *Boghano v. Gilbert Lock Co.*, 73 Md. 132; *Cameron v. Roberts*, 87 Wis. 291; *Atchison v. Morris*, 11 Fed. Rep. 582.

8, *Williams v. Bacon*, 10 Wend. 636; *Moore v. Green*, 73 N. C. 394; 21 Am. Rep. 470; *Scott v. Curtis*, 27 Vt. 762;

Lucas v. Albee, 1 Den. 666; Hare v. Hyde, 16 Q. B. 394; R. v. Douglas, 7 Jur. 39.

9, Moletor v. Sinnen, 76 Wis. 308; 20 Am. St. Rep. 71 and cases cited. Contra, Williams v. Bacon, 10 Wend. 636.

10, Murphy v. Sweezy, 2 N. Y. S. 241.

11, Hare v. Hyde, 16 Adol. & Ell. N. S. 304; 71 E. C. L. 373; Moore v. Green, 73 N. C. 394; 21 Am. Rep. 470.

12, American Wooden Ware Co. v. Stem, 63 Fed. Rep. 676.

§ 807. **Exclusion of witnesses from court room.**—Before discussing the general rules which govern the examination of witnesses, it is proper to call attention to the familiar rule that the court may, in the exercise of its discretion, direct the *exclusion of witnesses* from the court room while the testimony of other witnesses is being given. This is a practice which has prevailed in the British Parliament and in the courts of England and Scotland from an early day.¹ The witnesses are ordered to withdraw from the court room to remain until called, or are placed under charge of the sheriff or other officer.² The *object of such an order* is obviously to elicit the truth by securing testimony not influenced by the statements of other witnesses or the suggestions of counsel, as well as to prevent collusion and concert of testimony among witnesses. While this order will generally be made by the court on the application of counsel, it is generally held to be a matter of *discretion*, rather than of strict

right;³ yet, in some states, it may be claimed as a right.⁴ *Parties* to the litigation will not generally be excluded, since their presence is usually necessary to a proper management of their case;⁵ nor will an *attorney* for one of the parties be excluded.⁶ The same is true of one who is a *party in interest*, though not a party to the record;⁷ and also of an *agent* of the party, when the presence of such agent is necessary, as when the agent has gained such familiarity with the facts that his presence is necessary for the proper management of the action or defense.⁸ *Expert witnesses* are not generally excluded until the evidence be given upon the question or subject as to which they are called.⁹ But if there is any reason to apprehend that the expert witnesses are liable to be influenced by the testimony of other witnesses, they should be treated in the same manner.¹⁰ In most cases, their evidence is not based upon the conclusions which they form from the testimony, but upon hypothetical questions or an assumed state of facts, or upon their personal knowledge of the facts; hence it is not necessary that they should listen to the testimony of other witnesses.¹¹ It is not an abuse of discretion to refuse to exclude an *officer*, who is a witness, while another officer is testifying.¹² Although in practice the demand is seldom made, the reason of the rule would seem to require the exclusion of witnesses *during the opening argument* of counsel, if requested.¹³

1, *Ryan v. Couch*, 66 Ala. 244; *Tayl. Ev. sec. 1402*; *Swift Ev. 512*.

2, *Hey v. Com.*, 32 Gratt. (Va.) 46; 34 Am. Rep. 799.

3, *Benaway v. Conyne*, 3 Pinn. (Wis.) 196; *Errissman v. Errissman*, 25 Ill. 136. *Johnson v. State*, 2 Ind. 652; *People v. Green*, 1 Park. Cr. (N. Y.) 11; *Powell v. State*, 13 Tex. App. 244; *Sartorius v. State*, 24 Miss. 602; *State v. Fitzsimmons*, 30 Mo. 236; *Laughlin v. State*, 18 Ohio 99; 51 Am. Dec. 444; *R. v. Cook*, 13 How. St. Tr. 348; *R. v. Goodere*, 17 How. St. Tr. 1015; *People v. Sam Lung*, 70 Cal. 515; *Barnes v. State*, 88 Ala. 204; 16 Am. St. Rep. 48; *People v. Considine*, (Mich.) 63 N. W. Rep. 196; *Murphey v. State*, 43 Neb. 34; *May v. State*, 94 Ga. 76; *Kentucky Lumber Co. v. Abney*, (Ky.) 31 S. W. Rep. 279; *Com. v. Thompson*, 159 Mass. 56. But the court may make exceptions as to certain witnesses, when making the order, *City Bank v. Kent*, 57 Ga. 285; *State v. Whitworth*, 126 Mo. 573.

4, *Nelson v. State*, 2 Swan (Tenn.) 237; *Smith v. State*, 4 Lea (Tenn.) 428; *State v. Zellers*, 7 N. J. L. 220.

5, *Chester v. Bower*, 55 Cal. 46; *Ryan v. Couch*, 66 Ala. 244. But see, *Smith v. Team*, (Miss.) 16 So. Rep. 492; *Penniman v. Hill*, 24 Weekly Rep. 245; *Tayl. Ev. sec. 1400*. This applies to the chief officers of a corporation, as well as to individuals that are parties, *Kentucky Lumber Co. v. Abney*, (Ky.) 31 S. W. Rep. 279.

6, *Everett v. Lowdham*, 5 Car. & P. 91; *Powell v. State*, 13 Tex. App. 244; *Pomeroy v. Baddeley*, *Ryan & M.* 430.

7, *Chester v. Bower*, 55 Cal. 46.

8, *Ryan v. Couch*, 66 Ala. 244; *Betts v. State*, 66 Ga. 508; *Indianapolis Cabinet Co. v. Herrmann*, 7 Ind. App. 462. But see, *Central Railroad & B. Co. v. Phillips*, 91 Ga. 526, where a railroad conductor was excluded.

9, *Johnson v. State*, 10 Tex. App. 571; *Tayl. Ev. sec. 1400*.

10, *Johnson v. State*, 10 Tex. App. 571; *Thomp. Trials sec. 278*.

11, See secs. 372 *et seq. supra*.

12, *People v. Machen*, 101 Mich. 400.

13, *R. v. Murphy*, 8 Car. & P. 297.

§ 808. **Violation of the order excluding witnesses—Effect of.**—By the early practice, if a witness remained in the court room in violation of the order, he was not allowed to testify.¹ Later it was held to be a matter of judicial discretion, whether his testimony should be received.² But in England, except in revenue cases, it is now held that the judge has no right to reject the witness on this ground;³ and in this country, the decided weight of authority tends toward the view that, where the party is without fault, and the witness disobeys the order for exclusion, the *party ought not to be deprived of the testimony of his witness.*⁴ Still there is good authority for the view that the testimony may be received or rejected in the *discretion* of the court; and the decision of the court is usually held to be final and not subject to review on appeal.⁵ When a witness, who has been ordered to withdraw, converses with other witnesses after their testimony has been given, the objecting party cannot demand a new trial as a matter of right on account of such misconduct, but, in the discretion of the court, a *new trial may be granted.*⁶ It is clear that the misconduct of a witness in disobeying the order of the

court, or in improperly conversing with other witnesses after an order of exclusion, is relevant, and that it is a proper subject of comment as bearing on his *credibility*.¹ It is hardly necessary to add that the disobedience of an order for the withdrawal of a witness may be punished as a *contempt* of court.²

1, Greenl. Ev. sec. 432. See also, *Chandler v. Horne*, 2 Moody & Rob. 423.

2, *Hey v. Com.*, 32 Gratt. (Va.) 946; 34 Am. Rep. 799; *Cobbett v. Hudson*, 1 El. & B. 11; 22 L. J. (Q. B.) 13.

3, *Chandler v. Horne*, 2 Moody & Rob. 423; *Cook v. Nethercote*, 6 Car. & P. 743; *Cobbett v. Hudson*, 22 L. J. (Q. B.) 13; 1 El. & B. 11.

4, *People v. Boscovitch*, 20 Cal. 436; *State v. Salge*, 2 Nev. 321; *State v. Thomas*, 111 Ind. 575; *Hubbard v. Hubbard*, 7 Ore. 42; *Smith v. State*, 4 Lea (Tenn.) 428; *Hey v. Com.*, 32 Gratt. (Va.) 946; 34 Am. Rep. 799; *Taylor v. State*, 130 Ind. 66; *Holder v. United States*, 150 U. S. 91; *Pleasant v. State*, 15 Ark. 624; *Grimes v. Martin*, 10 Iowa 347; *Gregg v. State*, 13 W. Va. 705; *Lassiter v. State*, 67 Ga. 739; *State v. Falk*, 46 Kan. 498; *State v. Ducote*, 47 La. An. 46; *State v. Lee Doon*, 7 Wash. 308. A court will not prohibit witnesses, who have been excluded from the court room, from reading newspapers, *Com. v. Hersey*, 84 Mass. 173.

5, *Laughlin v. State*, 18 Ohio 99; 51 Am. Dec. 444; *Purnell v. Purnell*, 89 N. C. 42; *Dyer v. Morris*, 4 Mo. 214; *State v. Gesell*, 124 Mo. 531; *Pergason v. Etcherson*, 91 Ga. 785; *Staver & Abbott Co. v. Coe*, 49 Ill. App. 426; *Thorn v. Kemp*, 98 Ala. 417. See also cases last cited. In those jurisdictions where the judge has the right to exclude the testimony, the power is rarely exercised, *Pleasant v. State*, 15 Ark. 624; *Sartorius v. State*, 24 Miss. 602.

6, *Bulliner v. People*, 95 Ill. 394; *State v. Brookshire*, 2 Ala. 303; *Sartorius v. State*, 24 Miss. 602; *Laughlin v. State*, 18

Ohio 99; 51 Am. Dec. 444; State v. Fitzsimmons, 30 Mo. 236. It has been held no impropriety for counsel to tell a witness what a witness on the other side has sworn to, when not forbidden to do so, Harne v. Williams, 12 Ind. 324. The rule is the same where the witness disobeyed, remained in the room and heard the testimony, Purnell v. Purnell, 89 N. C. 42.

7, Pleasant v. State, 15 Ark. 624; Betts v. State, 66 Ga. 508; Grimes v. Martin, 10 Iowa 347; Davenport v. Ogg, 15 Kan. 363.

8, Lassiter v. State, 67 Ga. 739; Bulliner v. People, 95 Ill. 394; State v. Falk, 46 Kan. 498.

§ 809. Order of proof—Discretion of court—Evidence not to be given piecemeal.—Before proceeding to an examination of those general rules which govern the order and mode of the examination of witnesses, attention should be called to the principle, well stated by Mr. Greenleaf, that "the subject lies chiefly in the *discretion of the judge*, before whom the cause is tried, it being, from its very nature, susceptible of but few positive and stringent rules. The great object is to elicit the truth from the witness, but the character, intelligence, moral courage, bias, memory and other circumstances of witnesses are so various, as to require almost equal variety in the manner of interrogation. and the degree of its intensity to attain that end."¹ In the regular order of procedure, the party having the affirmative ought to introduce all the evidence necessary to support

the substance of the issue; then the party denying the affirmative allegations should produce his proof, and finally the proof in rebuttal is received.² *Rebutting evidence* means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove. The trial judge is to determine what is evidence in rebuttal; and it lies within his discretion to receive or to exclude such testimony.³ The practice should not be encouraged of allowing either party, after resting his case, to amend and add to his proof, until by repeated experiments he conforms to the view of the court;⁴ and when the burden of proving any matter is thrown upon a party by the pleadings, he must generally *introduce, in the first instance, all the evidence upon which he relies*; and he cannot, after going into part of his case, reserve the residue of his evidence for a subsequent opportunity.⁵

1, Greenl. Ev. sec. 431.

2, *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 115; *Smith v. Britton*, 4 Humph. (Tenn.) 201; *Clayes v. Ferris*, 10 Vt. 112; *Walker v. Walker*, 14 Ga. 242; *Macullar v. Wall*, 6 Gray 507.

3, *Marshall v. Davies*, 78 N. Y. 414, 420.

4, *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 115.

5, *Hathaway v. Hemingway*, 20 Conn. 191; *Hastings v. Palmer*, 20 Wend. 225.

§ 810. Same — Relaxation of the rule discretionary—Illustrations.—In the discretion of the court, the rule stated in the last section may be *relaxed*, if the ends of justice so require.¹ Thus in a criminal case, the state may be allowed to *reopen the case*, and to give new testimony, after the defense has given testimony or declined to offer testimony.² But the court should use great caution in such cases.³ New evidence may be admitted for the plaintiff after a motion for nonsuit,⁴ or *after all the evidence has been closed*⁵ and instructions asked for.⁶ On the same principle, counsel have been allowed to further cross-examine witnesses after the case has been closed.⁷ So the introduction of new evidence may be allowed after the conclusion of the evidence and *postponement for argument* only,⁸ or after counsel have begun to address the jury,⁹ or even after the conclusion of the argument, if it is shown to be material, and if the delay is sufficiently explained.¹⁰ Of course, in the exercise of discretion in such cases as have been cited, new testimony must not be so received without giving the adverse party an opportunity to be present and cross-examine the witness and to offer counter-proof or explain the evidence so introduced,¹¹ nor unless the evidence is properly admissible under the pleadings.¹² It is a further illustration of the principle under discussion that the court may permit a party

to open one line of proof, and to abandon it in the course of the trial and take an inconsistent one;¹³ and this has been allowed on the part of the plaintiff, even after the defendant has rested his case.¹⁴ In some states, there are statutes regulating this subject which should be consulted by the practitioner.

1, *Graham v. Davis*, 4 Ohio St. 362; 62 Am. Dec. 285; *Blake v. Powell*, 26 Kan. 320; *Curtis v. Central Ry. Co.*, 87 Ga. 416; *Hastings v. Palmer*, 20 Wend. 225; *Agate v. Morrison*, 84 N. Y. 672; *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 115; *State v. Alford*, 31 Conn. 40; *Dubuque v. Coman*, 64 Conn. 475; *State v. Fox*, 25 N. J. L. 566; *Dane v. Treat*, 35 Me. 198; *Pierce v. Wood*, 23 N. H. 519; *Goodman v. Kennedy*, 10 Neb. 270; *Walker v. Walker*, 14 Ga. 242; *People v. McNamara*, 94 Cal. 509.

2, *State v. Clyburn*, 16 S. C. 375; *State v. Rose*, 33 La. An. 932.

3, *Clough v. State*, 7 Neb. 323; *Kaile v. People*, 4 Park. Cr. (N. Y.) 591.

4, *McColgan v. McKay*, 25 Ga. 631; *Delaney v. Mulligan*, 148 Pa. St. 157; *Larman v. Huey*, 13 B. Mon. (Ky.) 436.

5, *Philadelphia Ry. Co. v. Stimson*, 14 Peters 448; *Wells v. Walker*, 29 Ga. 450; *Wells v. Burbank*, 17 N. H. 393; *Gilbert v. Gilbert*, 22 Ala. 529; 58 Am. Dec. 268; *Thatcher v. Stickney*, 88 Iowa 454; *Priest v. Union Canal Co.*, 6 Cal. 170; *Hooker v. Johnson*, 6 Fla. 730; *Foreman v. Baldwin*, 24 Ill. 298; *Coats v. Gregory*, 10 Ind. 345; *Braydon v. Goulman*, 1 T. B. Mon. (Ky.) 115; *McDonald v. Smith*, 14 Me. 99; *Ricketts v. Pendleton*, 14 Md. 320; *Ray v. Smith*, 9 Gray 141; *Wood v. Gibbs*, 35 Miss. 559; *Des Moines Bank v. Colfax Hotel Co.*, 88 Iowa 4; *Dozier v. Jerman*, 30 Mo. 216; *Ford v. Niles*, 1 Hill 300; *Moloney v. Davis*, 48 Pa. St. 512; *Hopkinton v. Waite*, 6 R. I. 374; *Pridgen v. Hill*, 12 Tex. 374; *Brooks v. Wilcox*, 11 Gratt. (Va.) 411.

6, Johnston v. Mason, 27 Mo. 511; Meserve v. Folsom, 62 Vt. 504.

7, Com. v. Eastman, 1 Cush. 189; 48 Am. Dec. 596.

8, Hanson v. Michelson, 19 Wis. 498; Reed v. Liston, 8 Tex. Civ. App. 118.

9, Russell v. Kearney, 27 Ga. 96; Parker v. Johnson, 25 Ga. 576.

10, Watt v. Alvord, 25 Ind. 533; Mathis v. Colbert, 24 Ga. 384; Hood v. Mathis, 21 Mo. 308; George v. Pilcher, 28 Gratt. (Va.) 299. But after the jury had returned to give their verdict, it was held too late, Riley v. Cooper, 1 Cranch C. C. 166.

11, Hurd v. Lill, 26 Ill. 496; Thompson v. Clendening, 1 Head (Tenn.) 287; Asay v. Hay, 89 Pa. St. 77; Gillette v. Morrison, 9 Neb. 395.

12, Wagar v. Bowley, (Mich.) 62 N. W. Rep. 293.

13, Turner v. Yates, 16 How. 14.

14, Morris v. Wadsworth, 17 Wend. 103.

§ 811. Same—Discretion of court—Review.—It is obvious from the illustrations already given that the proffered testimony will not be received out of its regular order, if, in the discretion of the court, the ends of justice will not thereby be subserved.¹ The rulings of the trial judge upon these matters are not, as a rule, reversible for error.² The rules relating to the order of introducing evidence are for the most part mere rules of practice; they are under the control of the court and subject to be varied in the exercise of a sound *judicial discretion*, so that a departure from the ordinary rules or a refusal to grant indulgence to a party *cannot properly be made*

*a ground of error.*³ This has been illustrated in a large class of cases where the courts have granted indulgence in receiving evidence out of the regular order, in allowing witnesses to be recalled, in permitting evidence in rebuttal which should have been offered in chief, in supplying omissions and the like.⁴ But if there is a clear *abuse of discretion*, or if the error of the court is so gross and palpable as to defeat the ends of justice, the decision will be reversed on appeal.⁵ It is very clear that it is no abuse of discretion if the court refuses to allow the introduction of evidence out of its order, when it is apparent that the relaxation of the general rule would further a mere trick or scheme, or operate as a fraud upon one of the parties,⁶ or encourage the tampering with witnesses to induce them to prop up a cause whose weakness has been exposed.⁷

1, *Cozart v. Lisle*, 1 Meigs (Tenn.) 65; *Louisville & N. Ry. Co. v. Barker*, 96 Ala. 435; *Snodgrass v. Com.*, 89 Va. 679; *Mutual Life Ins. Co. v. Thompson*, 94 Ky. 253.

2, *Wells v. Burbank*, 17 N. H. 393; *Bacon v. Williams*, 13 Gray 525; *Kirsch on v. Bonzel*, 67 Wis. 178; *San Francisco Breweries v. Schurtz*, 104 Cal. 420. This is assumed in most of the cases cited in the last section.

3, See the cases cited in the next note.

4, *Goss v. Turner*, 21 Vt. 437; *Wicke v. Iowa State Ins. Co.*, 90 Iowa 4; *Brown v. State*, 72 Md. 468; *Huff v. Latimer*, 35 S. C. 255; *Richmond & D. Ry. Co. v. Vance*, 93 Ala. 144; *Springfield v. Dalby*, 139 Ill. 34; *Riha v. Pelnar*, 86 Wis. 408; *Jackson v. Grand Ave. Ry. Co.*, 118 Mo. 199; *Stevens v. Clemmens*, 52 Kan. 369; *Everman v. City*

of Menomonie, 81 Wis. 624; Turner v. United States, 66 Fed. Rep. 280; Garland v. Smith, 127 Mo. 583; Lindheim v. Duys, 31 N. Y. S. 870; Bates v. Tower, 103 Cal. 404; Basye v. State, 45 Neb. 261; Willard v. Pettit, 153 Ill. 663; Devereaux v. Phillips' Estate, 97 Mich. 104; Case v. Dodge, 18 R. I. 661. See also the cases cited in last section.

5, Smith v. Britton, 4 Humph. (Tenn.) 201; Hanson v. Michelson, 19 Wis. 498; Meyer v. Cullen, 54 N. Y. 392; Meacham v. Moore, 59 Miss. 561; Smith v. State Ins. Co., 58 Iowa 487.

6, Breedlove v. Bundy, 96 Ind. 319.

7, Rucker v. Eddings, 7 Mo. 115.

§ 812. **Privilege allowed counsel as to order of proof.**—Subject to the general rule that each party should, in his turn, produce all the testimony tending to support his claim or defense, the order of time for the introduction of evidence to support the different parts of an action or defense should be generally left to the discretion of the party and his counsel.¹ The party or counsel cannot be presumed to show his ability to establish his entire claim or defense in advance, and a *reasonable latitude* must be *allowed as to the order* in which the details of evidence shall be brought forward.² When evidence is offered which proves or tends to prove any relevant fact, it is to be presumed that this will be followed by such other proof as is necessary to establish the proper connection.³ Hence, it is of no consequence in what order the evidence is introduced, so far as its ultimate legitimacy is concerned, provided, in its rela-

tion to the other evidence in the case, it is *at the end pertinent to the issue.*⁴ For example, the court may permit a sheriff's deed to be given in evidence before the judgment and execution on which it is founded are introduced;⁵ and where one relies on his right as assignee of a bond, he may introduce the bond in evidence before he shows his title and interest in it.⁶ So, in an action of ejectment, the mere fact that the plaintiff's mode of proving his title is illogical and serves to confuse the record is not ground for a new trial.⁷ In an Ohio case, it was held that the rule under discussion should be limited to cases where the objection to the testimony related mainly to its relevancy to the issue, and did not extend to cases where the objection is to its *legal incompetency to prove the fact.* "In the one case, there is a *fact proved* which subsequent developments may show to be relevant to the issue, but in the other, there has been *no legal proof of the fact* itself, and when made relevant it would still be incompetent."⁸

1, Hadden v. Johnson, 7 Ind. 394; Sidwell v. Worthington, 8 Dana (Ky.) 74; Gordon v. Milloudon, 16 La. An. 347; Plank Road Co. v. Bruce, 6 Md. 457; Lea v. Guice, 21 Miss. 656; Powell v. Hannibal Ry. Co., 35 Mo. 457; Com. v. Dam, 107 Mass. 210.

2, Pegg v. Warford, 7 Md. 582; Thompson v. Franks, 37 Pa. St. 327.

3, Rogers v. Brent, 10 Ill. 573; 50 Am. Dec. 422.

4, Jenne v. Joslyn, 41 Vt. 478.

5, Catterlin v. Douglass, 17 Ind. 213.

6, Van Orman v. Spafford, 16 Iowa 186.

7, Stephenson v. Wilson, 50 Wis. 95.

8, Wilson v. Barkalow, 11 Ohio St. 474. In this case the testimony, when offered, was mere hearsay.

§ 813. Must the relevancy of the proof appear at the time.—It has often been declared that the relevancy of testimony need not always appear at the time when it is offered, since it is "the usual course to receive, at any proper and convenient stage of the trial, in the discretion of the judge, any evidence which the counsel shows will be rendered material by other evidence which he undertakes to produce. If it is not subsequently thus connected with the issue, it is to be laid out of the case."¹ But before counsel can claim the indulgence of the court in this manner to introduce evidence, otherwise presumably incompetent, he should state what he expects to prove, or in some other way *satisfy the court that the evidence will be made competent.*² By the weight of authority, it is held that, if counsel fail to make the testimony relevant by other evidence, the improper testimony may be *withdrawn from the jury* by careful instructions to disregard it.³ But, on the other hand, it is urged by very high authority that the influence of improper testimony upon the minds of the jury cannot in fact be removed by the instruction of the court, and that in law the error is not cured by such instructions,⁴ nor by the offer of the

counsel who has introduced the objectionable testimony to withdraw it.⁵ It is very clear that the court should exercise great caution, especially in criminal cases, in admitting testimony of doubtful competency upon the promise of counsel to show its materiality by subsequent proof. Common fairness requires that counsel should not unnecessarily urge the admission of evidence out of its proper order or promise to show its relevancy, unless able to do so. "Where the case is one of delicacy and importance, and the evidence is nicely balanced, and the scale liable to be affected by slight circumstances, the court will be exceedingly vigilant in preventing any extraneous or irrelevant matter from being brought before the jury. In such cases, it is proper to require counsel to state the substance of what they expect to prove, in order that, if irrelevant or improper, the evidence may not be given. Where the lines of the case are more broadly marked, less caution is necessary."⁶ It is apparent that the indulgence might work serious injury to a party by creating prejudices in the minds of the jury which no instruction could withdraw or efface. In such a case, the admission of the improper testimony would seem to be such an abuse of discretion as should be reviewed.⁷

1, Greenl. Ev. sec. 51 a. See sec. 170 *supra*.

2, Mechelke v. Bramer, 59 Wis. 57; Piper v. White, 56 Pa. St. 90; Abney v. Kingsland, 10 Ala. 355; 44 Am. Dec. 491; Van Buren v. Wells, 19 Wend. 203.

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3. Hopt v. Utah, 120 U. S. 430; Specht v. Howard, 16 Wall 564; Blount v. Beall, 95 Ga. 182; Umangst v. Kraemer, 8 Watts & S. (Pa.) 391; Mimms v. State, 16 Ohio St. 221; Hamblett v. Hamblett, 6 N. H. 333; Pavey v. Burch, 3 Mo. 447; 26 Am. Dec. 682; Beck v. Cole, 16 Wis. 95; Smith v. Whitman, 6 Allen 562; Blizzard v. Applegate, 77 Ind. 516; Davis v. Peveler, 65 Mo. 189; State v. May, 4 Dev. (N. C.) 328; Goodnow v. Hill, 125 Mass. 587; Dillin v. People, 8 Mich. 357; Jones v. United States Mut. Acc. Assn., (Iowa) 61 N. W. Rep. 485; State v. Towler, 13 R. I. 661. See sec. 170 *supra*.

4. Erben v. Lorillard, 19 N. Y. 299; Gulf Ry. Co. v. Levy, 59 Tex. 542; 46 Am. Rep. 269; Lafayette, B. & M. Ry. Co. v. Winslow, 66 Ill. 219.

5. Furst v. Second Ave. Ry. Co., 72 N. Y. 542.

6. People v. White, 14 Wend. 115. See sec. 170 *supra*.

7. Lychoming Fire Ins. Co. v. Rubin, 79 Ill. 402; Howe Machine Co. v. Rosine, 87 Ill. 105; Gulf Ry. Co. v. Levy, 59 Tex. 542; 46 Am. Rep. 269; Marshal v. State, 5 Tex. App. 273.

§ 814. Further illustrations of discretion of the court in conducting trial.—

It is a further illustration of the discretionary control of the trial judge over the conduct of the trial and the examination of witnesses that he may determine *whether a witness may be recalled* and examined subsequently to his first examination.¹ This is frequently allowed in the sound discretion of the court, although other proceedings have intervened.² While the discretion is sometimes too indulgently exercised in allowing such recall, the *appellate court will not interfere* where the request is allowed or refused, *unless the discretion is clearly abused*.³ This is especially

true where the discretion is exercised in favor of the re-examination.⁴ On the same principle, where the *examination* of a witness is *needlessly protracted*, it is within the discretion of the court to arrest it;⁵ and the judge may properly interfere of his own motion.⁶ On the other hand, it may frequently be necessary to allow a *repetition of statements* by a witness or the repetition of interrogatories, until full answers are obtained.⁷ Although it is elementary that parties have the right to maintain their respective claims by producing witnesses, and that this right should not be unfairly limited, yet it is the well settled practice of trial judges to *limit the number of witnesses* or depositions upon a particular fact or issue.⁸ While the court generally notifies counsel to limit the number of witnesses, the practice is so familiar that the exercise of the discretion may be anticipated in proper cases without such notice. It may be stated generally, that the reception of *evidence which is merely cumulative* in its character is a matter that rests in the sound discretion of the court.⁹ It has repeatedly been held that it is not error to exclude testimony as to facts which have already been established by other evidence,¹⁰ unless this right of the court is abused.¹¹ This is especially true where such evidence is not offered until the charge to the jury has been begun or a nonsuit granted.¹² It is not an unusual prac-

tice for the *trial judge* to interpose during the examination and to *propound questions* to the witness,¹³ or to suggest the form of a question,¹⁴ and it has even been held in England that a judge may call a witness and examine him, and that neither side may cross-examine such witness.¹⁵ It is obvious that these privileges of the court should be so exercised as not to prejudice the rights of the parties,¹⁶ or to unduly interfere with the presentation of the cause of action or defense; and, while the judge may of course state the grounds of his rulings in receiving or rejecting testimony, *comment upon the weight of the evidence* at the time of its introduction should be avoided as an invasion upon the province of the jury.¹⁷ But the right is inherent in the court, on its own motion, to check and silence a witness who is going beyond bounds in the testimony which he is giving.¹⁸ The privilege to examine witnesses has also been extended to *jurors*, when exercised to draw out or clear up some uncertain point.¹⁹ The trial judge should, upon motion, *strike out answers* that are *not responsive* to the questions asked, that is, those answers that state facts not called for by the questions,²⁰ or those which express an opinion as to the matter in question,²¹ unless the question calls for an opinion, as in the case of experts.²² The same is true where the form of the question is such as to make it necessary

to give additional details.²³ The refusal of the trial judge to strike out an irresponsible answer is reversible error,²⁴ unless it is shown that such evidence is not prejudicial to the party appealing.²⁵ But where only a part of the answer is not responsive to the question, only that part will be stricken out which is objectionable for not being responsive.²⁶ It is not the duty of the court to instruct the jury to disregard answers so stricken out, unless requested to do so by counsel.²⁷

1, See cases cited below.

2, *State v. Glass*, 50 Wis. 218; 36 Am. Rep. 845; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122. See sec. 810 *supra*.

3, *People v. Mather*, 4 Wend. 230; 21 Am. Dec. 122, where it was held no abuse of discretion to allow the recall of a witness after a day had elapsed, and other witnesses had been called; *State v. Coleman*, 27 La. An. 691; *Johnston v. Mason*, 27 Mo. 511; *Samuels v. Griffith*, 13 Iowa 103; *Morningstar v. State*, 59 Ala. 30; *Cothran v. Forsyth*, 68 Ga. 560; *Jones v. Smith*, 64 N. Y. 180. The witness may be recalled in the discretion of the court for re-examination-in-chief, *Brown v. Burrus*, 8 Mo. 26; or for cross-examination, *Cummings v. Taylor*, 24 Minn. 429.

4, *Treadway v. State*, 1 Tex. App. 668.

5, *Morein v. Solomons*, 7 Rich. L. (S. C.) 97; *Mulhallen v. State*, 7 Ind. 646; *Woolfolk v. State*, 85 Ga. 69; *Allen v. Kirk*, 81 Iowa 658; *McGuire v. Lawrence Manfg. Co.*, 156 Mass. 324; *Jones v. Stevens*, 36 Neb. 849; *Hamilton v. Hulett*, 51 Minn. 208.

6, *State v. McGee*, 36 La. An. 206.

7, *Joslin v. Grand Rapids Ice Co.*, 53 Mich. 322; *Crow v. Marshall*, 15 Mo. 499; *Aurora v. Hillman*, 90 Ill. 61; *Patrick v. Crowe*, 15 Col. 543.

8, *Mergentheim v. State*, 107 Ind. 567, limited to seven in a nuisance case; *Preston v. Cedar Rapids*, (Iowa) 63 N. W. Rep. 577, to seven in an action for damages; *Everett v. Union Pac. Ry. Co.*, 59 Iowa 243, to five in condemnation proceedings; *Huett v. Clark*, 4 Col. App. 231; *Meier v. Morgan*, 82 Wis. 289, where it was held that objection to such an order, as unreasonable, must be made at the time of the ruling. So expert witnesses may be limited in number, *Hilliard v. Beattie*, 59 N. H. 462. But in *Nelson v. Wallace*, 57 Mo. App. 397, it was held that error to limit the witnesses offered to prove bad character to three. A similar rule was adopted in *Village of South Danville v. Jacobs*, 42 Ill. App. 533, where the number of witnesses as to controlling fact in the case was limited.

9, *Kuhn v. American Knife Co.*, 29 N. Y. S. 73; *Jacksonville, T. & K. W. Ry. Co. v. Wellman*, 26 Fla. 344; *Delgado v. Gonzales*, (Tex. Civ. App.), 28 S. W. Rep. 459.

10, *Mears v. Cornwall*, 73 Mich. 78; *Couts v. Neer*, 70 Tex. 468; *Owen v. Williams*, 114 Ind. 179; *Lake Shore & M. S. Ry. Co. v. Brown*, 123 Ill. 162; *Dobson v. Cothran*, 34 S. C. 518; *Cory v. Hamilton*, 84 Iowa 594.

11, *Galveston, H. & S. A. Ry. Co. v. Matula*, 79 Tex. 577.

12, *Seekell v. Norman*, 78 Iowa 254; *American Eagle Tobacco Co. v. Pierce*, 70 Mich. 633. It has, however, been held error to exclude material evidence on a disputed point, although it be cumulative in its nature, *Fenwick v. Bowling*, 50 Mo. App. 516. See also, *Galveston, H. & S. A. Ry. Co. v. Matula*, 79 Tex. 577; *Stillwell v. Farwell*, 64 Vt. 286.

13, *Bowden v. Achor*, 95 Ga. 243; *Sanders v. Bagwell*, 37 S. C. 145; *Lefever v. Johnson*, 79 Ind. 554.

14, *Metroplitan St. Ry. Co. v. Johnson*, 91 Ga. 466; *Underhill Ev. sec. 334*.

15, *Coulson v. Disborough*, 2 Q. B. Div. (1894) 316.

16, *Sparks v. State*, 59 Ala. 82; *Bowden v. Anchor*, 95 Ga. 243. As to province of judge and jury, see sec. 171 *supra*.

17, *Queen Ins. Co. v. Studebaker*, 117 Ind. 416; *Thompson v. Ish*, 99 Mo. 166.

18, *Robinson v. State*, 82 Ga. 535; *Bowden v. Bailes*, 101 N. C. 612.

19, *Shaefer v. St. Louis & S. Ry. Co.*, 128 Mo. 64. See also an article on the right of judge and jury to question witnesses, 13 Cent. L. Jour. 345.

20, *Pence v. Waugh*, 135 Ind. 143; *Angell v. Loomis*, 97 Mich. 5; *Irlback v. Bierle*, 84 Iowa 47; *Chicago, K. & W. Ry. Co. v. Woodward*, 47 Kan. 191.

21, *Lazard v. Merchants' & M. T. Co.*, 78 Md. 1.

22, *Griffith v. Utica & M. Ry. Co.*, 17 N. Y. S. 692.

23, *Horan v. Chicago, St. P., M. & O. Ry. Co.*, 89 Iowa 328; *Baldwin v. Walker*, 94 Ala. 514, where a witness was asked "to tell about it."

24, *Krey v. Schlusser*, 16 N. Y. S. 695.

25, *Colclough v. Neland*, 63 Wis. 309.

26, *Benjamin v. New York El. Ry. Co.*, 17 N. Y. S. 908.

27, *State v. McGahey*, 3 N. Dak. 293.

§ 815. Leading questions — General rule.—There is no rule of evidence more familiar to the practitioner than the one which forbids *leading questions* on the direct examination of witnesses. " 'A question,' says Mr. Bentham, 'is a leading one, when it indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer.' Is not your name so and so? Do you reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him? It is clear that under this form every sort of information may be conveyed to the witness in disguise. It may be used to

prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information, is in reality *giving* instead of *receiving* it.'"¹ The objections to this line of interrogation sufficiently appear from the last quotation from Mr. Bentham. But the further considerations may be added that the witness may often be presumed to have some *bias* in favor of the party producing him; and that leading or suggestive questions, as they are sometimes called, would allow the party to extract only so much of the knowledge of the witness as would be favorable or even put a false gloss on the whole.² While the authorities concur in the proposition that leading questions are in general improper,³ some difficulty has arisen in determining what questions are leading and what are not, within the meaning of the rule. It is very clear that a *question is leading which suggests* to the witness *the answer* which he is to make, or which puts into his mouth words which he is to echo back.⁴ *But if it merely suggests a subject*, without suggesting an answer or a specific thing, it is not leading.⁵ It has often been declared that a question is objectionable, as leading, which embodies a material fact and admits of answer by a simple *affirmative or negative*.⁶ While it is true that a question which may be answered by yes or no is generally leading,

there may be such questions which in no way suggest the answer desired, and to which there is no real objection.⁷ On the other hand, leading questions are *by no means limited to those which may be answered by yes or no*. A question proposed to a witness in the form "whether or not," that is, in the alternative, is not necessarily leading. But it may be so, when proposed in that form, if it is so framed as to suggest to the witness the answer desired.⁸

1, Bentham Rationale of Judicial Evidence. For a general discussion of leading questions, see note, 47 Am. Dec. 82-85.

2, Best Ev. sec. 641.

3, Whart. Ev. sec. 499; Greenl. Ev. sec. 434; Best Ev. sec. 641; 2 Phill. Ev., (3rd Am. ed.) 401.

4, Turney v. State, 16 Miss. 104; 47 Am. Dec. 74; People v. Mather, 4 Wend. 229; 21 Am. Dec. 122; Page v. Parker, 40 N. H. 47; Harvey v. Osborn, 55 Ind. 535.

5, Born v. Rosenow, 84 Wis. 620.

6, 1 Greenl. Ev. sec. 434; United States v. Angell, 11 Fed. Rep. 34; 1 Stark. Ev. 167.

7, Speer v. Richardson, 37 N. H. 23; Floyd v. State, 30 Ala. 511; Mathis v. Buford, 17 Tex. 152; Adams v. Harrold, 29 Ind. 189.

8, Bartlett v. Hoyt, 33 N. H. 151; Pelamourges v. Clark, 9 Iowa 1; State v. Johnson, 29 La. An. 717; People v. Mather, 4 Wend. 229; 21 Am. Dec. 122; Weber v. Kingsland, 8 Bosw. (N. Y.) 415; State v. Watson, 81 Iowa 380.

1816. Same—Cases illustrating the rule.—As illustrative of the general subject under discussion, the following questions

have been *held leading and objectionable*: "Did you make any agreement at that time?"¹ "State whether or not you had any difficulty in following the tracks."² Whether the witness was in the habit of acting by A's consent and with his approbation to every extent in reference to buying goods.³ It was so held where an employee, after he had testified fully as to the accident, was asked if he had done all in his power to prevent the accident;⁴ and when an engineer was asked: "From your knowledge and experience as engineer, was it possible to have stopped the train after you saw the plaintiff on the track?"⁵ The *following questions* have been *held not to be leading*: "Do you know any circumstances which will show you that the defendant knew his son was at school?"⁶ "What had you seen in the way of intoxicating liquors being sold in that building?"⁷ "Do you know whether A. was ever prosecuted for stealing a horse, if so, by whom and where?"⁸ In a suit for breach of promise of marriage, after a witness for the plaintiff had testified that he had paid attention to the plaintiff, plaintiff's counsel asked the question: "Did you court her?" This was held not to be a leading question.⁹ So questions *in the alternative* have been held proper, for example: "Whether or not testator's insanity took the form of dislike to his relatives and friends."¹⁰ In a damage suit against a street railway company the question: "When you

hailed the car, did you stop on the sidewalk, or did you continue walking until you got near the car?" was held proper.¹¹ So in a murder case: "Did the noise sound as if the person was in joy or distress? Was it as if she was laughing or crying, or if she was suffering from pain or enjoying pleasure? Or was she making a mere idle noise, as if nothing was the matter with her?"¹² So the question: "Do you know whether or not he bought his father's homestead?" was held proper.¹³ So in proving the contents of an award, the question: "State whether or not this is a true copy of the award" was held proper.¹⁴

1, Dudley v. Elkins, 39 N. H. 78.

2, Hopper v. Com., 6 Gratt. (Va.) 684.

3, Lee v. Tinges, 7 Md. 215.

4, Springfield Con. Ry. Co. v. Welsh, 155 Ill. 511; Galveston, H. & S. A. Ry. Co. v. Duelin, 86 Tex. 450.

5, Galveston, H. & S. A. Ry. Co. v. Duelin, 86 Tex. 450.

6, Floyd v. State, 30 Ala. 511.

7, State v. Schilling, 14 Iowa 455.

8, Sexton v. Brock, 15 Ark. 345.

9, Greenup v. Stoker, 8 Ill. 202.

10, Pelamourges v. Clark, 9 Iowa 1.

11, Olfermann v. Union Depot Ry. Co., 125 Mo. 408.

12, Malcik v. State, 33 Tex. Cr. Rep. 14.

13, Robertson v. Craver, 88 Iowa 381.

14, Adams v. Harrold, 29 Ind. 198. For further illustrations, see Thomp. Trials sec. 358.

§ 817. Exceptions to the rule—**Hostile witnesses—Introductory questions.**

A well recognized exception to the general rule which is under discussion permits leading questions to a witness who is *hostile* to the party calling him, or who, for any reason, may be deemed an unwilling witness.¹ If it is apparent that the witness is attempting to promote the interest of the adverse party,² or if the witness is in fact the *adverse party*, the court will be justified in permitting the direct examination to take the character of a cross-examination; and, in the latter case, leading questions may be asked as a matter of right.³ This unwillingness, or other state of mind of the witness, is to be decided by the judge from his demeanor upon the stand and from such facts in evidence as may show that the witness, because of his relationship to a party, interest in the cause or for other reason, has some *bias* against the one calling him or some *disinclination to testify*. Again leading questions are proper where they are merely *introductory* and designed to lead the witness more quickly to matters which are material to the issue. For example, in cases of conversations, admissions or agreements, the attention of the witness may be drawn to the subject, occasion, time, place or person and he may be asked directly whether such person said anything on the subject thus brought under his attention, and, if so, what

he said.⁴ Questions regarding the age, antecedents, business and experience of a witness are largely within the discretion of the court; and, unless it manifestly appears that such questions are put for an improper purpose, such discretion is not reviewable as error.⁵ On a question of *identification*, a witness may be asked whether the person pointed out to him is the person in question,⁶ though, of course, if the witness can himself point out the person in question without the aid of such a question, his evidence will have greater weight.

1, *Bradshaw v. Coombs*, 102 Ill. 428; *Com. v. Thrasher*, 11 Gray 57; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *Bank of Northern Liberties v. Davis*, 6 Watts & S. (Pa.) 285; *Towns v. Alford*, 2 Ala. 378; *Hopkinson v. Steele*, 12 Vt. 582; *Baker v. State*, 69 Wis. 32; *Klock v. State*, 60 Wis. 574; *McBride v. Wallace*, 62 Mich. 451; *State v. Benner*, 64 Me. 267; *Conway v. State*, 118 Ind. 482; *State v. Tall*, 43 Minn. 273; *Rosenthal v. Bilger*, 86 Iowa 246; *State v. Keith*, 53 Mo. App. 383.

2, *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122. See cases last cited.

3, *Clarke v. Saffery, Ryan & M.* 126; *Childs v. Merrill*, 66 Vt. 302; *Greenl. Ev. sec. 435*.

4, *Williams v. Jarot*, 6 Ill. 120; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *Carlyle v. Plumer*, 11 Wis. 96; *Long v. Steiger*, 8 Tex. 460; *Cronan v. Cotting*, 99 Mass. 334; *Strawbridge v. Spann*, 8 Ala. 820; *Boothby v. Brown*, 40 Iowa 104; *Stark. Ev. 124*.

5, *Cochran v. United States*, 157 U. S. 286.

6, *Sadler v. Murrah*, 4 Miss. 195; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122.

§ 818. Same — As to facts not remembered — For purposes of contradiction. —

Another exception to the general rule is that leading questions may sometimes be put to a witness after his memory on the subject is exhausted, and when he has omitted some fact by reason of *want of recollection*. The question is not necessarily leading, although it supply a name or date,¹ or some connecting fact or link which will enable the witness to recall a forgotten fact;² and, if the witness is testifying as to articles lost or destroyed or goods sold, his attention may be called to items not remembered.³ In the confusion and embarrassment of witnesses, leading questions are often found necessary, and especially in the case of those who, by reason of *tender years* or *old age*, ignorance or some *infirmity*, are unable to state important facts without some aid or suggestion.⁴ But leading questions should be avoided in all cases, if possible. Another exception arises where it is desired to show that a witness on the opposite side has, at another time, made a statement *contradictory to his present statement*. Where the attention of such witness has been called, on cross-examination, to the alleged contradictory statement, and he has denied it, another witness may be asked the direct question whether the particular words denied were in fact used by the former witness.⁵ There is, however, a conflict of opinion on this subject;

and there is very high authority for the view that, in such a case, the proper course of examination is to ask "what the witness in fact said relative to the matter in question, and not in the first instance to ask in the leading form whether he said so and so."⁶ In his work on evidence, Mr. Taylor suggests that the rule allowing the leading question in such cases "should only apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation which would not be admissible."⁷

1, *Acerro v. Petroni*, 1 Stark. 100.

2, *Huckins v. Peoples' Mutual Ins. Co.*, 31 N. H. 238; *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317; *Lowe v. Lowe*, 40 Iowa 220; *O'Hagan v. Dillon*, 76 N. Y. 170; *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Coon v. People*, 99 Ill. 368; 39 Am. Rep. 28; *Schultz v. State*, 5 Tex. App. 390; *Farrell v. Boston*, 161 Mass. 106; *Polson v. State*, 137 Ind. 519, child of ten years of age.

3, *Graves v. Merchants' Ins. Co.*, 82 Iowa 637; *Clark v. Fee*, 86 Ga. 9.

4, *Cheney v. Arnold*, 18 Barb. 434, blindness and old age; *Kemmerer v. Edelman*, 23 Pa. St. 143; *Brassell v. State*, 91 Ala. 45; *Acerro v. Petroni*, 1 Stark. 100, witness not able to remember a person's first name; *Hodge v. State*, 26 Fla. 11, infants; *Cassem v. Galvin*, 53 Ill. App. 419; *Olferman v. Union Depot Ry. Co.*, 125 Mo. 408; *Polson v. State*, 137 Ind. 519. See cases cited in note 2 *supra*. Contra, *Coon v. People*, 99 Ill. 368; 39 Am. Rep. 28, as to leading questions to children.

5, *Potter v. Bissell*, 3 Lans. (N. Y.) 205; *Rounds v. State*, 57 Wis. 45; *Best Ev. sec. 642*; *Whart. Ev. sec. 503*; *Greenl. Ev. sec. 435*. See secs. 848 *et seq. infra*.

6, 2 Phill. Ev. 404; Harrington v. Lincoln, 2 Gray 133; Seavy v. Dearborn, 19 N. H. 351; Allen v. State, 28 Ga. 395; 73 Am. Dec. 760.

7, Tayl. Ev. sec. 1405; Hallett v. Cousens, 2 Moody & Rob. 238.

§ 819. Leading questions — Discretion of the court.—Although, as we have seen, there are certain general rules governing this subject of leading questions, very much must be left to the discretion of the trial judge. Says Mr. Best: "It should never be forgotten that 'leading' is a relative, not an absolute term. There is no such thing as 'leading' in the abstract, for the identical form of question which would be leading of the grossest kind in one case or state of facts might not only be unobjectionable, but the very fittest mode of interrogation in another."¹ The subject is one of judicial discretion;² and the allowing or refusing leading questions is *not generally a ground for appeal*.³ If, however, there appears a clear *abuse of discretion*, it is ground for exception and reversal.⁴ An abuse of discretion on the part of the judge, in allowing a witness to answer a leading question, may be cured by subsequent proceedings, as where substantially the *same question* is asked and answered *on cross-examination*.⁵

1, Best Ev. sec. 641.

2, Porath v. State, 90 Wis. 527; Funk v. Babbitt, 156 Ill. 408; Anderson v. State, 104 Ala. 83; People v. Considine, (Mich.) 63 N. W. Rep. 196; Lake Shore & M. S. Ry. Co. v. Anthony, 12 Ind. App. 126; Howard v. Johnson, 91 Ga.

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319; *St. Clair v. United States*, 154 U. S. 134; *Carder v. Primm*, 52 Mo. App. 102; *Moody v. Rowell*, 17 Pick. 498. So a judge may ask leading questions with a view to elicit the facts, *Huffman v. Camble*, 86 Ind. 591, 596.

3, *Donnell v. Jones*, 13 Ala. 490; 48 Am. Dec. 59; *Par-melee v. Austin*, 20 Ill. 35; *State v. Lull*, 57 Me. 246; *York v. Pease*, 2 Gray 282; *Green v. Gould*, 3 Allen 465; *Smith v. Hutchings*, 30 Mo. 380; *Severance v. Carr*, 43 N. H. 65; *Walker v. Dunspaugh*, 20 N. Y. 170; *Barton v. Kane*, 17 Wis. 38; 84 Am. Dec. 728; *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317; *Parker v. Georgia Pac. Ry. Co.*, 83 Ga. 539; *State v. Chee Gong*, 17 Ore. 635; *People v. Fung Ah Sing*, 70 Cal. 8.

4, *Northern Pac. Ry. Co. v. Urlin*, 158 U. S. 271; *Doran v. Mullen*, 78 Ill. 342; *State v. Benner*, 64 Me. 267; *Goudy v. Werbe*, 117 Ind. 154; *White v. White*, 82 Cal. 427; *Whiting v. Mississippi Valley Ins. Co.*, 76 Wis. 592.

5, *Fox v. Steever*, 156 Ill. 622.

§ 820. Cross-examination — On subject matter of direct examination.— It is the English rule that, if a competent witness is intentionally called and sworn for the purpose of giving evidence, the right of cross-examination exists, although no testimony is actually given.¹ The rule does not, however, extend to a witness who is simply subpoenaed to produce a document to be identified or proved by another witness,² nor to a witness who is sworn by mistake, but not examined.³ According to the *English rule*, where a witness is called to a particular fact, he becomes a witness for all purposes and may be fully cross-examined upon all matters material to the issue, the examination not being confined to

the matters inquired about in the direct examination.⁴ The same rule has been followed in some jurisdictions within the United States.⁵ But the rule which was long ago declared by the supreme court of the United States, and which prevails in most of the states is quite different. The cross-examination can only relate to *facts and circumstances connected with the matters stated in the direct examination of the witness*. If a party wishes to examine a witness as to other matters, he must do so by making the witness his own.⁶ But a court will not, in such a case, consider the error in the line of inquiry, unless the record shows that the subject matter was not opened up in the examination-in-chief.⁷ Under the rule that generally prevails, *the fact that other witnesses have testified to certain matters* does not subject a witness to cross-examination as to such matters, unless he has testified as to them himself;⁸ nor can a witness be cross-examined upon *evidence* given in the direct examination which has subsequently been *stricken out*.⁹ But, if such immaterial or irrelevant evidence has not been stricken out, it is error to refuse cross-examination as to the facts treated in it.¹⁰ The rule limiting the cross-examination to the general subject matter of the direct examination is certainly more conducive to the systematic and orderly trial of causes, and it has the further merit that it prevents the

cross-examiner from proving, by leading questions, independent facts by a witness friendly to him whom the adverse party is obliged to call.¹¹ This rule clearly applies when the attempt is made to draw out, by cross-examination, facts having no connection with the matters stated in the direct examination, but constituting the *substantive defense or claim of the cross-examiner*.¹² For example, if the direct examination of the payee of a note is confined to the question of the genuineness of the signature or the identity of the note, the adverse party has no right to cross-examine as to the consideration;¹³ and in ejectment, the plaintiff's witnesses cannot, on cross-examination, be examined as to the defendant's title.¹⁴ So in an action on a guardian's bond, when the plaintiff's witness does not testify upon the subject, he cannot be cross-examined to show that the bond was not duly executed.¹⁵ But the mere fact that evidence, called forth by a legitimate cross-examination, happens also to sustain a cross action or counter-claim affords no reason why it should be excluded.¹⁶

1, R. v. Brooke, 2 Stark. 472; Phillips v. Eamer, 1 Esp. 355; Blackington v. Johnson, 126 Mass. 21; State v. Sayers, 58 Mo. 585; Linsley v. Lovely, 26 Vt. 123; Kibler v. McIlwain, 16 S. C. 550. See notes on cross-examination, 12 L. R. A. 693; 15 L. R. A. 669-674. See article on examination of witnesses at common law, 22 Law Rep. 577; also articles, 27 Cent. L. Jour. 305; 6 Crim. L. Mag. 520; 23 Sol. Jour. & Rep. 523; 48 Alb. L. Jour. 209.

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2, *Summers v. Moseley*, 2 Crompt. & M. 477; 4 Tyr. 158; *Perry v. Gibson*, 1 Adol. & Ell. 48; *Davis v. Dale*, 4 Car. & P. 335; *Griffith v. Ricketts*, 7 Hare 300; *Reed v. James*, 1 Stark. 132.

3, *Wood v. Mackinson*, 2 Moody & Rob. 273; *Clifford v. Hunter*, 3 Car. & P. 16; *Rush. v. Smith*, 1 Crompt., M. & R. 94.

4, *Mayor v. Murray*, 19 L. J. (Ch.) 281; *Tayl. Ev. sec. 1432*; *Steph. Ev. art. 127*. The same rule there prevails, although the proof is of a merely formal character, *Morgan v. Brydges*, 2 Stark. 314.

5, *Beal v. Nichols*, 2 Gray 262; *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317; *Blackington v. Johnson*, 126 Mass. 21; *Jones v. Roberts*, 37 Mo. App. 163; *Lunday v. Thomas*, 26 Ga. 537; *Lamprey v. Munch*, 21 Minn. 379; *Linsley v. Lovely*, 26 Vt. 123; *Ireland v. Cincinnati Ry. Co.*, 79 Mich. 163; *Hay v. Reid*, 85 Mich. 296; *News Pub. Co. v. Butler*, 95 Ga. 559. See also, *State v. Anderson*, 126 Mo. 542.

6, *Philadelphia Ry. Co. v. Stimpson*, 14 Peters 461; *Houghton v. Jones*, 1 Wall. 702; *Wills v. Russell*, 100 U. S. 621; *Northern Pac. Ry. Co. v. Umlin*, 158 U. S. 271; *People v. Oyer & Term. Court*, 83 N. Y. 436; *Leedom v. Leedom*, 160 Pa. St. 273; *Hurlbut v. Meeker*, 104 Ill. 541; *State v. Taylor*, 45 La. An. 1303; *Donnelly v. State*, 26 N. J. L. 463, 601; *Austin v. State*, 14 Ark. 555; *State v. Smith*, 49 Conn. 376; *State v. Swayze*, 30 La. An. 1323; *Tourtellotte v. Brown*, 1 Col. App. 408; *Lueck v. Heisler*, 87 Wis. 644; *In re Westerfield Estate*, 96 Cal. 113; *Herrick v. Swomley*, 56 Md. 439; *Ferguson v. Rutherford*, 7 Nev. 385; *Rush v. French*, 1 Ariz. 99; *Adams v. State*, 28 Fla. 511; *Rosum v. Hodges*, 1 S. Dak. 308; *People v. Denby*, 108 Cal. 54; *Mordhorst v. Nebraska Telephone Co.*, 28 Neb. 610; *Amos v. State*, 96 Ala. 424; *Moellering v. Evans*, 121 Ind. 195; *Butler v. Chicago, B. & Q. Ry. Co.*, 87 Iowa 206; *Aichison v. Rose*, 43 Kan. 605; *Hurlbut v. Hall*, 39 Neb. 889; *People v. Thiede*, 11 Utah 211. This rule applies to parties, as well as other witnesses, *Hansen v. Miller*, 145 Ill. 538. See sec. 844 *infra*.

7, *Houston v. Brush*, 66 Vt. 331.

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8, *State v. Taylor*, 45 La. An. 1303. See also cases cited in note 6 *supra*.

9, *Jones v. State*, 35 Fla. 289.

10, *Valin v. McKerreghan*, (Mich.) 62 N. W. Rep. 340.

11, *Knapp v. Schneider*, 24 Wis. 70; *Tourtelotte v. Brown*, 1 Col. App. 408.

12, *Donnelly v. State*, 26 N. J. L. 463, 601; *Norris v. Cargill*, 57 Wis. 251; *Denniston v. Philadelphia Co.*, 161 Pa. St. 41; *People v. Oyer & Term. Court*, 83 N. Y. 436.

13, *Youmans v. Carney*, 62 Wis. 580; *Bell v. Prewitt*, 62 Ill. 361; *Brady v. Henry*, 77 Cal. 324. Such testimony is not allowed as part of the *res gestae*, *Youmans v. Carney*, 62 Wis. 580; *McFadden v. Mitchell*, 61 Cal. 148. But it was held otherwise in *Lemprey v. Munch*, 21 Minn. 379.

14, *Thatcher v. Olmstead*, 110 Ill. 26.

15, *Britton v. State*, 115 Ind. 55.

16, *Rush v. French*, 1 Ariz. 99; *Wendt v. Chicago, St P., M. & O. Ry. Co.*, 4 S. Dak. 476.

§ 821. **Further discussion and qualification of the rule.**—The general rule under discussion does not require that the cross-examining counsel shall be confined to the phases of a subject introduced in the direct examination. Where a *general subject* is entered upon in the examination-in-chief, the cross-examining counsel may ask any relevant question on the general subject, and is not bound to follow the *line of examination* pursued by the adverse party.¹ It is sometimes held that, even as to matters *purely defensive*, it rests in the sound discretion of the court to allow the defendant to cross-examine the plaintiff's witnesses.² Although there are in-

stances in which it has been held error, even in civil actions, to allow cross-examination as to matters not connected with the examination-in-chief,³ yet it is the prevailing rule that very much must be left to the *discretion of the presiding judge* in the determination of this question. It has been said that, "unless a trial court should so far overstep the bounds as to admit that in cross-examination which clearly has no connection with the direct testimony, an appellate court would not be justified in reversing a judgment for such cause, especially where the cross-examination is upon facts competent to be proved under the issues in the case."⁴ But the rule, limiting the inquiry to the general facts stated in the direct examination, must not be so construed as to defeat the real object of the cross-examination. One of the objects of the cross-examination is to elicit the whole truth of *transactions, only partly explained*. Hence, questions intended to fill up designed or accidental omissions of the witness, or to call out facts tending to contradict, explain or modify some inference which might otherwise be drawn from his testimony are legitimate cross-examination.⁵ Although the court may exercise a reasonable discretion in regulating or limiting the cross-examination, yet it is clearly *error to exclude cross-examination upon subjects included in the examination-in-chief*, where such ruling is prejudicial.⁶ So

far as such cross-examination of a witness relates either to facts in issue or facts relevant to the issue, it may be pursued by counsel as a matter of right.¹

1, *Vogel v. Harris*, 112 Ind. 494; *Pye v. Bakke*, 54 Minn. 107; *Hay v. Reid*, 85 Mich. 296; *Austrian v. Springer*, 94 Mich. 343; *Davis v. Hays*, 89 Ala. 563; *Sayres v. Allen*, 25 Ore. 211.

2, *McNair v. Rewey*, 62 Wis. 167; *Neil v. Thorn*, 88 N. Y. 270.

3, *Bell v. Prewitt*, 62 Ill. 361.

4, *Glenn v. Gleason*, 61 Iowa 28; *Hughes v. Westmoreland Co.*, 104 Pa. St. 207; *Haynes v. Ledyard*, 33 Mich. 319; *Herrick v. Swombey*, 56 Md. 439; *Riordan v. Guggerty*, 74 Iowa 688; *Jones v. Stevens*, 36 Neb. 849; *Hamilton v. Hulett*, 51 Minn. 208; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401; *State v. Morris*, 109 N. C. 820; *People v. McNamara*, 94 Cal. 509. As to when new matter may be introduced on re-direct examination, see *Springfield v. Dalby*, 139 Ill. 34.

5, *Chandler v. Allison*, 10 Mich. 460; *Langworthy v. Town of Green*, 88 Mich. 207; *People v. Russell*, 46 Cal. 121; *Reiser v. Portere*, (Mich.) 63 N. W. Rep. 1041; *Ah Doon v. Smith*, 25 Ore. 89; *Wilson v. Wagner*, 26 Mich. 452; *Graham v. Larimer*, 83 Cal. 173; *Yeoman v. State*, 21 Neb. 171; *Gilmer v. Higley*, 110 U. S. 47; *Haynes v. Ledyard*, 33 Mich. 319; *Hardy v. Milwaukee St. Ry. Co.*, 89 Wis. 183; *People v. Bidleman*, 104 Cal. 608; *Hall v. Chicago, R. I. & P. Ry. Co.*, 84 Iowa 311; *Central Ry. Co. v. Allmon*, 147 Ill. 471; *Olson v. Swenson*, 53 Minn. 516, cross-examination as to contradictory statements made to a third person; *Holdridge v. Lee*, 3 S. Dak. 134; *Blenkiron v. State*, 40 Neb. 11; *Basye v. State*, 45 Neb. 21; *Hamilton v. Gray*, 67 Vt. 233; *People v. Gordon*, 103 Cal. 568; *Derk v. Northern Central Ry. Co.*, 164 Pa. St. 243; *Stiles v. Estabrooks*, 66 Vt. 535; *Bevan v. Atlanta Nat. Bank*, 142 Ill. 302.

6, *Sayres v. Allen*, 25 Ore. 211; *Yost v. Minneapolis Works*, 41 Ill. App. 556; *People v. Dixon*, 94 Cal.

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255; Hall v. Chicago, R. I. & P. Ry. Co., 84 Iowa 311; Eames v. Kaiser, 142 U. S. 488.

7. Laugley v. Wadsworth, 99 N. Y. 61; Storm v. United States, 94 U. S. 76. See also cases last cited.

§ 822. Same—Details may be called for—Questions showing improbability of direct testimony.—From the rules already stated, the right to call for the *details and particulars* of matters stated in general terms in the direct examination may be implied.¹ Thus, if a *part of the conversation* or transaction has been given in direct testimony, the remainder, so far as it is relevant, may be called out by the cross-examination, as the inquiry and answer in such case may tend to impeach, rebut, explain or qualify the testimony already given.² But it is a qualification of this rule elsewhere discussed, that distinct and *independent statements*, in no way connected with the statement given in direct examination, and which in no way tend to qualify or explain such statement, cannot be called out on cross-examination, although forming part of the same conversation.³ It is no violation of the general rule under discussion to allow a witness to be asked questions naturally tending to show the *improbability of statements made in the examination-in-chief*. Thus, where a witness claimed to have been robbed of a large amount of money, it was held admissible to show, by cross-examination, that he was heav-

ily indebted and embarrassed financially, and that he had made statements largely exaggerating his assets; and on a trial for seduction under promise of marriage, when the witnesses for the prosecutrix testified to the fact that the defendant had kept company with her, it was held proper to show that other persons had kept company with her in a similar manner.⁵ While it is the prevailing rule that new matter cannot be brought out on cross-examination, many other illustrations might be given of the right to elicit, on such examination, all such particular facts as tend to disprove the essential or ultimate facts of the case, which the direct examination has tended to prove.⁶ It will be seen, as we proceed, that the general rule limiting the cross-examination to the matters elicited in the examination-in-chief does not exclude questions tending to *discredit or impeach the witness*, or those designed to show his *interest*, prejudice or motives, or to test his *accuracy*, intelligence and means of knowledge.⁷

1, Hyland v. Milner, 99 Ind. 308; Curren v. Ampersee, 96 Mich. 553; People v. Liphardt, (Mich.) 62 N. W. Rep. 1022; Cunningham v. Austin & N. W. Ry. Co., 88 Tex. 534; Williams v. State, 32 Fla. 315.

2, Mason v. Tallman, 34 Me. 472; Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S. Dak. 476; Harness v. State, 57 Ind. 1; Phares v. Barber, 61 Ill. 271; Watrous v. Cunningham, 71 Cal. 30; Shakelford v. State, 43 Tex. 138; Addison v. State, 48 Ala. 478; Roberts v. Roberts, 85 N. C. 9; Home Benefit Assn. v. Sargent, 142 U. S. 691; People v. Dixon,

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94 Cal. 255; Ferris v. Hard, 135 N. Y. 354; Wolf v. Wolf, 158 Pa. St. 621. See secs. 169 *supra*, 874 *infra*.

3, People v. Beach, 87 N. Y. 508; Rouse v. Whited, 25 N. Y. 170; 82 Am. Dec. 337; Com. v. Keyes, 11 Gray 323; Jacobs v. Town of Craydon, (N. H.) 27 At. Rep. 122; 1 Phill. Ev. (4th Am. ed.) 416. The same rule applies to the declarations of a third person, as well as a party to the suit, Platner v. Platner, 78 N. Y. 90. See secs. 874, 875 *infra*.

4, People v. Morrigan, 29 Mich. 4; Yeaw v. Williams, 15 R. I. 20; Pontius v. People, 82 N. Y. 339, where a prisoner stated that he had lost certain money.

5, Stinehouse v. State, 47 Ind. 17; State v. Brown, 86 Iowa 121.

6, Ferguson v. Rutherford, 7 Nev. 385; Tapley v. Forbes, 2 Allen 20; Hay v. Reid, 85 Mich. 296; State v. Row, 81 Iowa 138; McFadden v. Santa Anna Ry. Co., 87 Cal. 464. See cases cited above.

7, See secs. 829 *et seq.*, 848 *et seq. infra*.

§ 823. Facts that are part of *res gestae* may be shown.—We have seen that the cross-examination may extend to such matters as tend to qualify, rebut or explain statements made in the direct examination. On familiar principles, the cross-examination may call forth whatever forms part of the *res gestae*, although in the nature of new or defensive matter.¹ For example, the subscribing witness to a will may be cross-examined as to all that occurred at the time of its execution, and as to the physical and mental condition of the testator;² and, where a witness testifies to the signature of a note, he may be cross-examined as to the time and place and all the circumstances of such signature,³ and

he may be asked when he first saw the note and who first showed it to him.⁴ Other illustrations of the principle will be found in other sections.⁵

1, *Rhodes v. Com.*, 48 Pa. St. 396; *Youmans v. Carney*, 62 Wis. 580; *McNeal v. Pittsburg & W. Ry. Co.*, 131 Pa. St. 184; *Glenn v. Gleason*, 61 Iowa 28; *People v. Gallagher*, 100 Cal. 466; *Graham v. McReynolds*, 90 Tenn. 673; *Eames v. Kaiser*, 142 U. S. 488. See secs. 821 *supra*, 826 *infra*.

2, *Egbert v. Egbert*, 78 Pa. St. 326.

3, *Glenn v. Gleason*, 61 Iowa 28.

4, *Herrick v. Swombley*, 56 Md. 439.

5, See secs. 821 *supra*, 826 *infra*.

§ 824. Leading questions may be asked — As to new matter.—If any presumption is to be entertained as to the bias of witnesses, it is that the witness is unfavorable rather than favorable to the cross-examiner; hence, the reasons for the general rule excluding leading questions do not apply on cross-examination.¹ The value of cross-examination must depend upon the right of counsel to thoroughly probe the memory of an adverse witness, and to test his accuracy and truthfulness; hence, very great latitude is allowed as to the form of questions and the mode of conducting the examination. But, although it is the undoubted rule that leading questions may be asked on cross-examination, the rule is subject to the qualification that the court, in its discretion, may restrict the right, where the witness shows a *bias in favor*

of the cross-examiner. If the privilege were not thus subject to the control of the court, serious injustice might result, as one secretly hostile might control his bias in order to be called as a witness, and would only need an intimation from the cross-examining counsel to say whatever might be most favorable to him.¹ In those jurisdictions where the cross-examination is not confined to facts elicited on the examination-in-chief, it is allowable, in the discretion of the court, to ask *leading questions even as to the new matter.*² This view rests upon the supposed inconvenience of determining, in long and complicated examinations, whether a question applies wholly to new matters, or to subjects already referred to in the direct examination.³ But, as we have already seen, a stricter rule generally prevails as to calling out new or defensive matter on cross-examination. It is generally held that, as to such matter, the witness becomes the *witness of the cross-examiner*, and is subject to the usual rule which forbids a party to lead his own witness.⁴

1, See sec. 817 *supra*.

2, *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317.

3, *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317; *Beal v. Nichols*, 2 Gray 262. See sec. 820 *supra*.

4, *Moody v. Rowell*, 17 Pick. 490; 28 Am. Dec. 317.

5, *People v. Oyer & Term. Court*, 83 N. Y. 436; *Hurlburt v. Hall*, 39 Neb. 889; *Ellmaker v. Buckley*, 16 Serg. & R. (Pa.) 77; *Floyd v. Bovard*, 6 Watts & S. (Pa.) 75; *People v.*

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Moore, 15 Wend. 419; Jackson v. Son, 2 Caines (N. Y.) 178; Philadelphia & T. Ry. Co. v. Stimpson, 14 Peters 448. See sec. 820 *supra*.

§ 825. **How long right to cross-examine continues.**— It has sometimes been suggested that, when a person is once entitled to cross-examine a witness, the right *continues throughout the case*, so that, if he afterwards recalls the same witness, he may interrogate him by leading questions and treat him as the witness of the party who first adduced him.¹ This view rests upon the theory that every witness is supposed to be inclined most favorably toward the person calling him. But on the other hand, it is maintained that no such presumption should be entertained when a person is called as a *witness by both sides*;² and it would seem more in accord with the prevailing American rule that a party should be precluded from cross-examining a witness, when called in his own behalf, except in those cases where the witness betrays some bias or prejudice.³

1, Greenl. Ev. sec. 447.

2, Tayl. Ev. sec. 1453.

3, See sec. 820 *supra*.

§ 826. **More liberal rule as to relevancy on cross-examination.**— It will be seen, as we proceed, that the general rule requiring testimony to be confined to the point in issue is much more liberally construed in

the cross-examination of witnesses than in their examination-in-chief. While the party who produces a witness vouches for his credibility, the cross-examiner sustains no such relation to the witness. He is at liberty, and is often compelled to attack the credibility of the witness, and, for that purpose, must be allowed wide *latitude in asking questions* which would otherwise be wholly *irrelevant to the issue*. For the purpose of testing the credibility of a witness, it is permissible to investigate the situation of the witness with respect to the parties and to the subject of litigation, his *interest, his motives, inclinations and prejudices*, his *means of obtaining a correct and certain knowledge* of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory and description.¹ As incidental to this investigation, and within proper limits, the character, habits and mental condition of the witness may be investigated.² In order to test the accuracy or means of knowledge of a witness, it is admissible to ask, on cross-examination, if he was not, at the time referred to, under the influence of drink.³ So he may be asked his reasons for doing certain things as to which he has testified,⁴ or whether he has not *testified differently at a former trial*,⁵ or how he acquired the ownership to land which he testifies that he is the owner of;⁶ and, if he is a

party, he may be cross-examined as to *discrepancies* between his statements on the stand and the allegations of his pleadings, although the latter are sworn to and made by the advice of counsel.⁷ Where one is called to prove the correctness of his books, he may be asked whether he is not in the habit of making mistakes,⁸ and he may be cross-examined as to the items of an account which he has offered in evidence.⁹ If he testifies to any transaction, he may be cross-examined concerning the *particulars* of such *transaction*, as to what persons were present and as to other facts concerning himself or others, and concerning other transactions which might be wholly immaterial, except so far as they throw light upon his own powers of memory, habits of observation or reliability.¹⁰ Thus, in a suit for damages for injuries sustained in being ejected from a train, the witness may be cross-examined fully as to whether he had not had trouble with the trainmen before being ejected.¹¹ Where the plaintiff has testified as to his opinion of the *value of property*, it is competent for the defendant to show, by his cross-examination, the price for which it was actually purchased, and also the value of other articles included in the same purchase.¹² Where the question at issue is the amount of damages recoverable by one whose land has been appropriated, where the testimony consists mostly of

opinions, great latitude of cross-examination is allowed.¹³ But the extent of such cross-examination rests, in each case, in the discretion of the judge.

1, *Winston v. Cox*, 38 Ala. 268; *People v. Thomson*, 92 Cal. 506.

2, *Winston v. Cox*, 38 Ala. 268; *Wendt v. Chicago, St. P., M. & O. Ry. Co.*, 4 S. Dak. 476; *Johnston v. Farmers Fire Ins. Co.*, (Mich.) 64 N. W. Rep. 5; *Pease v. Burrowes*, 86 Me. 153; *Czewzka v. Benton Bellefontaine Ry. Co.*, 121 Mo. 201. For other cases, see secs. 839, 842 *et seq. infra*.

3, *International Ry. Co. v. Dyer*, 76 Tex. 156; *Pool v. Pool*, 33 Ala. 145; *State v. Rhodes*, (S. C.) 22 S. E. Rep. 306. Where it was in issue whether the plaintiff was drunk at a given time, it was held proper to ask, "are you not in the habit of getting drunk," *McCracken v. Markesan*, 76 Wis. 499. But the use of opium is not allowed to be proved, unless it is shown that the witness was under its influence when examined, or when the event occurred, or that his mind had been impaired, *Eldredge v. State*, (Fla.) 9 So. Rep. 448. But see, *People v. Webster*, 139 N. Y. 73. But it is not proper to ask on cross examination how many times the witness has been drunk since the particular time in question, *People v. Sutherland*, (Mich.) 62 N. W. Rep. 566.

4, *New Gloucester v. Bridgham*, 28 Me. 60.

5, *Greenl. Ev. sec. 449*.

6, *Wallace v. Wallace*, 62 Iowa 651.

7, *Hare v. Mahoney*, 14 N. Y. S. 81.

8, *Mechanics Bank v. Smith*, 19 Johns. 115.

9, *Thayer v. Barney*, 12 Minn. 502.

10, *People v. Fitzgerald*, 8 N. Y. S. 81; *State v. O'Brien*, 81 Iowa 93; *State v. Merriman*, 34 S. C. 16; *Hartford v. Champion*, 58 Conn. 268; *Black v. Wabash Ry. Co.*, 111 Ill. 351; 53 Am. Rep. 628; *People v. Cline*, 83 Cal. 374; *Keyser v. Kansas Ry. Co.*, 56 Iowa 440.

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11, Washburn v. Chicago, St. P., M. & O. Ry. Co., 84 Wis. 251.

12, Wells v. Kelsey, 37 N. Y. 143.

13, Central Branch Ry. Co. v. Andrews, 30 Kan. 590.
See secs. 165 *et seq. supra*.

§ 827. Witnesses cannot be contradicted as to wholly irrelevant matter.—Although witnesses may often be questioned, on cross-examination, as to matters collateral to the issue, for the purpose of testing their credibility, it is a well settled rule that witnesses cannot be interrogated as to matters wholly irrelevant, merely for the purpose of contradicting them by other evidence. Hence, if questions of this character are answered, the *answer cannot be contradicted* by the cross-examiner. If a party inquires of a witness as to immaterial matters, he must take the answer and cannot raise an issue thereon by introducing evidence to contradict it.¹ Thus, in an early case, the issue being whether the defendant had made a certain usurious contract with the witness, it was held that the witness could not be cross-examined as to other contracts made by him, with a view to contradict him.² Where the accused, on trial for indecent assault, was cross-examined as to indecent conduct with other persons, which he denied, it was held error to allow evidence contradicting his testimony on that subject.³ Such rebutting testimony was held improper in an action for murder, when defendant's

counsel asked a witness if he and the deceased were not members of the same order.⁴ Where a witness admitted that he had been a convict in state's prison, but alleged that he had since led a reputable life, it was held no error to reject evidence to show that he had been connected with a gambling house since his pretended reformation.⁵ In an action for bastardy, in which the prosecutrix denied on cross-examination that she had ever had sexual intercourse with another, it was held that, since the question was irrelevant, her answer was conclusive.⁶ In line with this view, the courts of last resort frequently declare that witnesses cannot be discredited or impeached by proof of specific acts of delinquency or immorality.⁷

1, *Holbrook v. Dow*, 12 Gray 357; *Lawrence v. Barker*, 5 Wend. 301; *Clinton v. State*, 33 Ohio St. 27; *Smith v. State*, 5 Neb. 181; *Hester v. Com.*, 85 Pa. St. 139; *Robertson v. Com.*, (Va.) 22 S. E. Rep. 359; *Harris v. Wilson*, 7 Wend. 57; *Faulkner v. Rondoni*, 104 Cal. 140; *Eames v. Whittaker*, 123 Mass. 342; *State v. Payne*, 6 Wash. 563; *Eldridge v. State*, (Fla.) 9 So. Rep. 448; *Barkeley v. Copeland*, 86 Cal. 483; *State v. Rav*, 54 Kan. 160; *Crittenden v. Com.*, 82 Ky. 164; *State v. Falconer*, 70 Iowa 416; *State v. Morris*, 109 N. C. 820; *Moore v. People*, 108 Ill. 484; *State v. Roberts*, 81 N. C. 605; *Futch v. State*, 90 Ga. 472; *Lake Erie & W. Ry. Co. v. Morain*, 140 Ill. 117; *Com. v. Jones*, 155 Mass. 170; *People v. Hillhouse*, 80 Mich. 580; *Carter v. State*, 36 Neb. 481; *Union Pac. Ry. Co. v. Reese*, 56 Fed. Rep. 288. On this subject, see article, 6 *Crim. Law Mag.* 520.

2, *Spencely v. DeWillott*, 7 East 110; 2 *Lew. Cr. C.* 55.

3, *Tolman v. Johnstone*, 2 *Fost. & F.* 66.

4, *Surrell v. State*, 29 *Tex. App.* 321.

5, *Conley v. Meeker*, 85 N. Y. 618.

6, *State v. Patterson*, 74 N. C. 157.

7, *Lowery v. State*, 98 Ala. 45; *People v. Mills*, 94 Mich. 630; *People v. Sherman*, (Cal.) 32 Pac. Rep. 879; *Griffith v. State*, 140 Ind. 163; *Com. v. Smith*, 162 Mass. 508; *State v. Gezell*, 124 Mo. 531; *Clements v. McGinn*, (Cal.) 33 Pac. Rep. 920; *People v. O'Brien*, 96 Cal. 171. But see sec. 842 *infra*.

§ 828. Same — Further illustrations — Reversible error.—In an action against a street car company, for personal injury where the conductor had not testified as to the conduct of the driver, and where he denied, in answer to questions on cross-examination, that he had made statements to the effect that, if the driver had looked out, the accident would not have happened, it was held error to receive testimony contradicting him and showing that he had made such statements.¹ Where the witness has testified to the good reputation of a certain person and denied, upon cross-examination, that he had ever heard of certain difficulties in which such person had been involved, the testimony of the witness on that subject cannot be contradicted.² So where an impeaching witness, on cross-examination, states the names of the persons from whom he has heard reports as to the reputation of the person to be impeached, such statement, being on a collateral issue, is conclusive.³ The same rule applies where a party is asked as to an alleged cham-

pertous agreement with his attorney, there being no such defense alleged;⁴ or where the witness is asked how long he has known a certain individual, that not being a material question in the case,⁵ or where the witness is asked whether he had not been drinking with the adverse witnesses at particular places.⁶ On the same principle, affidavits for continuance, containing nothing material to the issue, are not admissible for this purpose.⁷ Where a witness was asked on cross-examination, if he had not on a former occasion committed larceny, and denied it, his denial had to be accepted without contradiction.⁸ In some cases, it happens that the *question is material* and relevant, but the *answer is immaterial*, as it tends to prove no fact having any bearing on the issue. For example, the negative statement of a witness, though made to a proper question, may have no probative force. In such case, it *cannot be contradicted* by showing his statement to the contrary made out of court, either to impeach his credibility or to prove the fact denied.⁹ If the court allows counsel, on cross-examination, to draw out irrelevant statements in violation of the rule, and then to contradict them by other witnesses, *it is reversible error*.¹⁰

1, Furst v. Second Ave. Ry. Co., 72 N. Y. 542. See also, Olson v. Swensen, 53 Minn. 516.

2, Hussey v. State, 87 Ala. 121.

3, Robbins v. Spencer, 121 Ind. 594.

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4, *Lueck v. Heisler*, 87 Wis. 644, where it is held that the exclusion of such a question is in the discretion of the judge.

5, *People v. Tiley*, 84 Cal. 651.

6, *Simons v. Busby*, 119 Ind. 13.

7, *Cotton v. State*, 87 Ala. 75; *Loftus v. Moxey*, 73 Tex. 242.

8, *Pullen v. Pullen*, 43 N. J. Eq. 136.

9, *Woodroffe v. Jones*, 83 Me. 21.

10, *People v. Hillhouse*, 80 Mich. 580; *Driscoll v. People*, 47 Mich. 413; *Morris v. Atlantic Ry. Co.*, 116 N. Y. 552.

§829. Partiality of witness relevant — On that subject cross-examiner not concluded by answer. — Although there has been more or less conflict of opinion upon the subject, the rule is now well settled that *questions*, on cross-examination, *which tend to impeach the impartiality* of the witness are *not irrelevant* to the issue in the sense that the cross-examiner is concluded by the answer.¹ "It is always competent to show that a witness is hostile to the party against whom he is called; that he has threatened revenge, or that a quarrel exists between them. A jury would scrutinize more closely and doubtingly the evidence of a hostile, than that of an indifferent or friendly witness. Hence, it is always competent to show the relations which exist between the witness and the party against, as well as the one for whom he is called."² If the witness denies his hostility or bias, this may be proved by

other witnesses.³ The cross-examination would be of little value, if the witness could not be freely interrogated as to his *motives, bias and interest*, or as to his *conduct as connected with the parties, or the cause of action*; and there would be little safety in judicial proceedings, if an unscrupulous witness could conclude the adverse party by his statements denying his prejudice or interest in the controversy. In like manner, it is competent to contradict the witness by calling other witnesses to show that, at the time of the event testified to, he was intoxicated or otherwise incapacitated, or *not in a condition to know and remember the facts*.⁴ In illustration of the principle under discussion, it has been held admissible, in an action on a promissory note, the execution of which was disputed, to ask the subscribing witness whether she was the plaintiff's kept mistress.⁵ On cross-examination, a witness may be asked whether he has not tampered with the witnesses or been active in procuring testimony in the case;⁶ whether he has not had a controversy with the party against whom he is called, and whether he has not made threats of revenge against him;⁷ whether he had not said that he would cause another witness to be arrested, if he should swear to a certain state of facts;⁸ whether he has not said that the party against whom he is called shall be beaten, if swearing can do it,⁹ or that he, the witness, would swear that black was white.¹⁰

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1, *Atwood v. Welton*, 7 Conn. 66; *Powell v. Martin*, 10 Iowa 568; *Newton v. Harris*, 6 N. Y. 345; *Day v. Stickney*, 14 Allen 255; *Schultz v. Third Ave. Ry. Co.*, 89 N. Y. 242; *Phenix v. Castner*, 108 Ill. 207; *Geary v. People*, 22 Mich. 220; *Collins v. Stephenson*, 8 Gray 438; *Folsom v. Brawn*, 25 N. H. 114; *Schuster v. State*, 80 Wis. 107; *Rosborough v. State*, 21 Tex. App. 672; *Hutchinson v. Wheeler*, 35 Vt. 340; *Hollinsworth v. State*, 53 Ark. 387; *People v. Brooks*, 131 N. Y. 321; *State v. McFarlain*, 41 La. An. 686; *Lewis v. Steiger*, 68 Cal. 200; *Starks v. People*, 5 Den. 106; *Illinois Cent. Ry. Co. v. Haynes*, 64 Miss. 604; *Crumpton v. State*, 52 Ark. 273; *Steph. Ev. art.* 130. See article on what answers are conclusive on the cross-examination in 6 *Crim. L. Mag.* 520. See sec. 831 *infra*.

2, *Newton v. Harris*, 6 N. Y. 345; *Holdridge v. Lee*, 3 S. Dak. 134. But it must be shown that the witness actually has such bias or hostile feeling, not merely that he has cause for such a feeling, *Wischstadt v. Wischstadt*, 47 Minn. 358.

3, See cases cited in note 19 of the next section.

4, *State v. Rollins*, 113 N. C. 722; *People v. Webster*, 139 N. Y. 73, as to the opium habit. See also sec. 826 *supra*.

5, *Thomas v. David*, 7 Car. & P. 350.

6, *Hamilton v. People*, 29 Mich. 173; *Queen's Case*, 2 Brod. & B. 311; *Bates v. Halladay*, 31 Mo. App. 162. But the mere offer of a bribe, that was not accepted by the witness, cannot be proved to discredit him, *Cheatham v. State*, 67 Miss. 335.

7, *Atwood v. Welton*, 7 Conn. 66. But see, *Holston v. Boyle*, 46 Minn. 432, where impeaching testimony to the effect that the witness belonged to a rival village faction was held to be too vague and remote.

8, *Schuster v. State*, 80 Wis. 107.

9, *Newton v. Harris*, 6 N. Y. 345.

10, *Texas Ry. Co. v. Brown*, 78 Tex. 397.

§ 830. Same — Further illustrations.—
For the reasons stated in the last section, it

is competent to ask the witness on cross-examination whether he has not offered to leave the jurisdiction of the court, and not appear as a witness against one of the parties, in case he should receive a sum of money as a consideration;¹ whether he has not said that he knew nothing about the case;² whether he is not anxious that the defendant should be convicted;³ whether he has not made a wager that one of the parties would succeed in the suit;⁴ whether he has employed counsel for the adverse party,⁵ or attempted to suborn the witnesses of the adverse party, or otherwise attempted to influence them either to give or to withhold testimony,⁶ or to prevent the adverse party from obtaining a surety.⁷ In order to show the state of mind of a witness, it was held permissible to ask her if her husband, who had been proven to be a desperate man, had not threatened her with bodily harm if she should not swear as he directed.⁸ So it may be shown that the defendant owes the witness money, which he would be less likely to collect if the plaintiff should obtain a judgment.⁹ Many other illustrations might be given of the rule that, for the purpose of affecting the credibility of a witness, he may be cross-examined as to his *interest* in the event of the suit,¹⁰ or his *state of feeling* toward the respective parties;¹¹ and, as incidental thereto, as to his *relations to the parties*.¹² In like manner, his expressions to

others showing hostility or prejudice to the adverse party,¹³ the amount of fees he expects to be paid,¹⁴ his conduct in connection with the cause of action, its management or the parties thereto,¹⁵ or as to collateral facts which tend to show that he is prejudiced or interested may be shown.¹⁶ It has frequently been held that it is error not to permit cross-examination as to the state of feeling or bias of the witness.¹⁷ But the *extent of such cross-examination* is within the sound discretion of the court.¹⁸ Although it is the general practice to first interrogate the witness on cross-examination as to his feelings of bias or hostility, yet it is proper to *prove the hostility of the witness by other competent witnesses* who can swear to the fact.¹⁹

1, State v. Downs, 91 Mo. 19.

2, Thompson v. Ish, 99 Mo. 160.

3, State v. Adams, 14 La. An. 620.

4, Kellogg v. Nelson, 5 Wis. 125; People v. Parker, 137 N. Y. 535.

5, People v. Blackwell, 27 Cal. 65.

6, Schultz v. Third Ave. Ry. Co., 89 N. Y. 242; Jenkins v. State, (Tex.) 29 S. W. Rep. 1078; State v. Downs, 91 Mo. 19; State v. Hack, 118 Mo. 92; Queen's Case, 2 Brod. & B. 312; Oberfelder v. Kavanaugh, 21 Neb. 483; Fitzpatrick v. Riley, 163 Pa. St. 65; Schuster v. State, 80 Wis. 107. But see, McCoy v. State, 27 Tex. App. 415.

7, Denton v. Smith, 61 Mich. 431.

8, Graham v. McReynolds, 88 Tenn. 240.

9, Meltzer v. Doll, 91 N. Y. 365.

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10, *Suit v. Bonnell*, 33 Wis. 180; *Blenkiron v. State*, 40 Neb. 11; *Drum v. Harrison*, 83 Ala. 384; *State v. Calkins*, 73 Iowa 128; *Meltzer v. Doll*, 91 N. Y. 365.

11, *Watson v. Twombly*, 60 N. H. 491; *Collins v. Stephenson*, 8 Gray 438; *Day v. Stickney*, 14 Allen 255; *State v. Olds*, 18 Ore. 440; *People v. Worthington*, 105 Cal. 166; *State v. Flint*, 60 Vt. 304; *People v. Webster*, 139 N. Y. 73; *Ledford v. Ledford*, 95 Ind. 283; *State v. Willingham*, 33 La. An. 537; *Garnsey v. Rhodes*, 138 N. Y. 461.

12, *Starks v. People*, 5 Den. 106; *Cameron v. Montgomery*, 13 Serg. & R. (Pa.) 128; *Turnpike Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311; *Madden v. Koester*, 52 Iowa 693; *Com. v. Gallagher*, 126 Mass. 54; *Kenyon v. Kenyon*, 72 Wis. 234; *Totten v. Burhans*, (Mich.) 61 N. W. Rep. 58; *Pettit v. State*, 135 Ind. 393.

13, *Newton v. Harris*, 6 N. Y. 345; *Watson v. Twombly*, 60 N. H. 491; *People v. Wasson*, 65 Cal. 538.

14, *Alford v. Vincent*, 53 Mich. 555. But in *King v. New York Central Ry. Co.*, 72 N. Y. 607, the court excluded a question asked an attorney, a witness, as to what extent his compensation depended on the recovery.

15, *People v. Furtado*, 57 Cal. 345; *Natim v. People*, 6 Park. Cr. (N. Y.) 258.

16, *Hitchcock v. Moore*, 70 Mich. 112; 14 Am. St. Rep. 474; *Drum v. Harrison*, 83 Ala. 384.

17, *Garnsey v. Rhodes*, 138 N. Y. 461; *People v. Brooks*, 131 N. Y. 321; *State v. Turlington*, 102 Mo. 642; *People v. Thompson*, 92 Cal. 506. See the last section, also cases cited in note 11 above.

18, *Consaul v. Sheldon*, 35 Neb. 247; *Garnsey v. Rhodes*, 138 N. Y. 461. See secs. 831, 837 *infra*.

19, *People v. Brooks*, 131 N. Y. 321; *Martin v. Barnes*, 7 Wis. 239; *Tucker v. Welsh*, 17 Mass. 160. See also, *England v. State*, 89 Ala. 76; *Crompton v. State*, 52 Ark. 273; *Texas Ry. Co. v. Brown*, 78 Tex. 397.

§ 831. Contradicting the witness to prove bias.—Although evidence to show

the state of feeling of a witness toward either party is not collateral, and may be received to contradict his statements, yet it is held that such evidence should be *direct and positive*, and not remote and uncertain.¹ Although the extent to which the cross-examination may extend depends very much upon the *discretion* of the trial judge,² yet, if testimony is rejected which would clearly show the bias of the witness, *it is error and ground for a new trial*.³ The rule has several times been declared in judicial decisions that, where the cross-examiner ascertains from the admission of the witness that he is prejudiced against or entertains a feeling of hostility toward the adverse party, the inquiry cannot be pressed further to show the *cause or ground of such hostility*,⁴ or the *details* of the facts showing his bias.⁵ On the other hand, the view is maintained in other courts that such testimony should be received. It is urged, with much reason, that the causes and particulars of the hostility may be important as bearing on the nature of the hostile feeling and its degree and intensity.⁶ Although, as we have seen, parties have the legal right to show the bias of witnesses upon cross examination, it is but reasonable that the method of such examination, in determining the reasons or the causes of such bias, should rest largely *in the discretion of the trial judge*.⁷

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1, *Gale v. New York C. Ry. Co.*, 76 N. Y. 594; *Schultz v. Third Ave. Ry. Co.*, 89 N. Y. 242.

2, *Storm v. United States*, 94 U. S. 76; *Wallace v. Taunton St. Ry. Co.*, 119 Mass. 91; *Com. v. Lyden*, 113 Mass. 452; *Canaday v. Krum*, 83 N. Y. 67; *People v. Oyer & Term. Court*, 83 N. Y. 436; *King v. New York Cent. Ry. Co.*, 72 N. Y. 607, where the court excluded a question asked an attorney, a witness, as to what extent his compensation depended on the recovery; *Hinchcliffe v. Koontz*, 121 Ind. 422; 16 Am. St. Rep. 403; *People v. Dillwood*, (Cal.) 39 Pac. Rep. 438; *Tobias v. Treist*, 103 Ala. 664.

3, *Schultz v. Third Ave. Ry. Co.*, 89 N. Y. 242; *Garnsey v. Rhodes*, 138 N. Y. 461; *People v. Lee Ah Chuck*, 66 Cal. 662; *State v. McFarlain*, 41 La. An. 686.

4, *Munden v. Baily*, 70 Ala. 63; *Chilton v. State*, 45 Md. 564.

5, *Patman v. State*, 61 Ga. 379; *State v. Gregory*, 33 La. An. 737; *People v. Goldenson*, 76 Cal. 328; *Polk v. State*, 62 Ala. 237; *Butler v. State*, 34 Ark. 480; *Conyers v. Field*, 61 Ga. 258; *Langhorne v. Com.*, 76 Va. 1012; *State v. Glynn*, 51 Vt. 577.

6, *State v. Collins*, 33 Kan. 77; *State v. Dee*, 14 Minn. 35; *Batdorf v. Bank*, 61 Pa. St. 179; *Davis v. Roby*, 64 Me. 427; *McFarlin v. State*, 41 Tex. 23; *Titus v. Ash*, 24 N. H. 319.

7, *Luck v. Ripon*, 52 Wis. 196. See last section.

§ 832. Collateral questions — Judicial discretion.— We have seen that the extent to which inquiry upon collateral matters may be allowed for the purpose of showing the witness to be unworthy of belief is largely within the discretion of the trial judge. But it not unfrequently happens that the examination is so restricted on the one hand, or given so wide a range on the other, that, in the opin-

ion of the *appellate court*, the substantial rights of parties have been prejudiced, and, in such cases, they will *review the rulings of the trial judge*. For example, it was held error to compel an attorney, who was a witness, to answer whether he had not been expelled from the bar, and to state the charges on which he was expelled.¹ So exceptions were sustained, when a witness was compelled to answer whether he had not rendered false accounts in a transaction having no connection with the matters in controversy,² or whether he had embezzled the property of his employer.³ The same ruling was adopted in an action where a witness was compelled to state whether he had written a certain letter which had no bearing upon the issues, but tended to prejudice the jury, the letter having been received in evidence.⁴ In a case decided by the New York court of appeals, which reviews several prior decisions of the same court, the defendant was on trial for larceny, and, during his cross-examination, he was compelled to answer the following question: "Were you also in 1869, along in February or March, arrested on a charge of bigamy?" The prisoner made no claim of privilege, but his counsel objected to the testimony, and the court of appeals held that it was error to compel an answer, on the ground that the question *did not* legitimately *tend to impair the credibility of the witness*, and was not

competent for any purpose.⁵ It has been held that an error in improperly excluding testimony on cross-examination in criminal cases is not *cured* by an offer, later in the trial, to allow cross-examination upon that subject, or by an offer to allow the witness to be introduced as a witness of the party injured by the rejection of such testimony.⁶ But such error in the exclusion of testimony is cured, if the facts sought to be elicited are subsequently introduced in evidence.⁷

1, *Smith v. Castles*, 1 Gray 108. See article, "Impeachment of Character," T. A. Polleys, 30 Cent. L. Jour. 241.

2, *Holbrook v. Dow*, 12 Gray 357.

3, *Slocum v. Knosby*, 70 Iowa 75.

4, *Com. v. Schaffner*, 146 Mass. 512.

5, *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302, distinguishing *People v. Brandon*, 42 N. Y. 265, and *People v. Connor*, 50 N. Y. 240. See secs. 834 *et seq. infra*.

6, *State v. Hollenbeck*, 67 Vt. 34.

7, *State v. Kelly*, (Iowa) 62 N. W. Rep. 842; *Hemming v. Western Assurance Co.*, 95 Mich. 355.

§ 833. *Same, continued.*—Where, in the opinion of the appellate court, the trial court has so *limited or abridged* the right of *cross-examination*, in respect to ascertaining the character and credibility of the witness, as to injuriously affect the substantial rights of a party, exceptions to such rulings will be sustained. In an action for murder, the defendant insisted that he was acting in self-de-

fense; the only witness who was present at the shooting was the wife of the deceased, and her testimony was in direct opposition to that of the defendant. On her cross-examination, the defense offered to prove by her that she had previously been married to one man, from whom she had never been divorced; that she then lived with another, who, by reason of her conduct, became jealous and shot her, afterwards killing himself; that she and the deceased lived together as man and wife until the previous fall, and that they were married by reason of the regulations governing the military reservation on which they lived. This offer was rejected. On appeal this ruling was held to be erroneous, on the ground that the rejected questions were proper cross-examination for the purpose of impeachment.¹ On the same principle, when the trial court excluded questions tending to show the present or recent *places of residence, occupation, association or acquaintances* of the witness, and the fact that he had at different times and places assumed different names, it was held error.²

1, *United States v. Wood*, 4 Dak. 455. See also, *People v. Ah Lee Doon*, 97 Cal. 171. See secs. 839, 840 *infra*.

2, *Kirschner v. State*, 9 Wis. 140; *Schuster v. Stont*, 30 Kan. 529.

§834. Questions as to former conviction or indictment. — There is a *conflict* in the decisions as to whether witnesses may be

asked on cross-examination if they have been *convicted or indicted, arrested* or confined in jail or in the penitentiary.¹ Where a witness is asked if he has been convicted or indicted, it may be objected, not only that the questions tend to degrade the witness by proof of a specific fact, but that the evidence called for is not the *best evidence*. It has been said by an eminent author that "the strain about secondary evidence in such a case is a mere quibble, totally destitute of common sense."² The objection, however, is too serious to be disposed of in this manner. If there is any class of documentary evidence which should be proved by the records themselves, it would seem to be judicial records. While it may be urged that the witness is certain of the facts in such cases, it may be urged with equal force that parties to written instruments are in general certain of the facts which they establish. But this is not generally deemed a sufficient reason for disregarding the familiar rule requiring the best evidence; and there is very high authority for the view that the general rule which calls for proof of the conviction or indictment of the witness should be observed as to questions on cross-examination.³ It has often been held that, if a witness admits on cross-examination that he has been guilty of violations of the law, such answers may be properly considered in determining whether his

moral character and credibility are impeached. The *question whether a witness has been indicted or arrested* for such offenses, or otherwise accused is certainly more objectionable, as it by no means follows that the witness is guilty of the offense so imputed. By a familiar rule, the *presumption of innocence* continues until conviction. Hence, questions of this character have been excluded, even in jurisdictions where considerable latitude is allowed in eliciting specific facts on cross-examination to impeach the credibility of the witness;⁴ and, in a recent case, it was held to be beyond the limits of proper cross-examination to ask a witness if an action for damages was not then pending against him for false swearing.⁵ But it has sometimes been held admissible to ask on cross-examination if the witness has been arrested,⁶ or indicted for certain offenses.⁷ It is proper cross-examination to ask a witness as to his occupation and places of residence, and when it happens to become known as an incidental consequence of such questions that the witness has been confined in jail, it is no ground of complaint.⁸

1, Ford v. State, 92 Ga. 459; Helwig v. Laschowski, 82 Mich. 619; Smith v. State, 64 Md. 25; Com. v. Sullivan, 150 Mass. 315; State v. Adamson, 43 Minn. 196. See note, 57 Am. Rep. 16-19; also articles, 39 Cent. L. Jour. 486; 38 Cent. L. Jour. 146.

2, Thomp. Trials sec. 467.

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3, *Newcomb v. Griswold*, 24 N. Y. 298; *Spiegel v. Hays*, 118 N. Y. 660; *Kirschner v. State*, 9 Wis. 140; *Clement v. Brooks*, 13 N. H. 92; *Com. v. Quin*, 5 Gray 478; *Greenl. Ev. sec. 457*. *Contra*, *Wilbur v. Flood*, 16 Mich. 40; 93 Am. Dec. 203. As to the statutes on this subject, see the next section.

4, *People v. Irving*, 95 N. Y. 541; *People v. Hamblin*, 68 Cal. 101; *Van Bokkelen v. Berdell*, 130 N. Y. 141; *Canada v. Curry*, 73 Ind. 246; *McKessan v. Sherman*, 51 Wis. 303; *Pullen v. Pullen*, 43 N. J. Eq. 136; *Spiegel v. Hayes*, 118 N. Y. 660. For illustrations where such questions have been allowed, see secs. 842 *et seq. infra*.

5, *Pennsylvania Co. v. Bray*, 125 Ind. 229.

6, *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496; *People v. Larsen*, 10 Utah 143; *Leland v. Kauth*, 47 Mich. 508; *Driscoll v. People*, 47 Mich. 413.

7, *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496; *Warren v. State*, 33 Tex. Crim. Rep. 502. See also, *Jackson v. State*, 33 Tex. Crim. Rep. 281. See secs. 839 *et seq. infra*.

8, *State v. Pugsley*, 75 Iowa 742; *State v. Row*, 81 Iowa 138.

1835. Same—Statutes.—In some jurisdictions, *by statute*, the *conviction of a witness may be shown* to affect his credibility, either by record or *by cross-examination*, and, if the witness denies the conviction, the answer is not conclusive.¹ By other statutes, conviction may be shown either by cross-examination or by the record, but only in case of felony.² Under a statute that provided that conviction may be shown to affect credibility, it was held admissible to ask the witness, on cross-examination, if he had been convicted of a certain offense, merely for the pur-

pose of identifying the person, where the record was introduced.³ Under a statute providing that "a witness may be interrogated as to his previous conviction for a felony," it is not admissible to ask, on cross-examination, if the witness was "ever convicted of a crime," since a crime is not necessarily a felony.⁴ Under statutes allowing cross-examination as to former convictions, the question should call for the time and place so as to apprise the witness of what is sought.⁵ In some jurisdictions, *statutes* exist providing that a witness cannot be impeached by evidence of *particular wrongful acts*.⁶ Under such a statute, it was held improper to ask a witness on cross-examination whether he is not the person who was arrested for beating a woman of the town, and who appeared, pleaded guilty and paid a fine therefor.⁷

1, New York, Penal Code sec. 714; Minnesota, Penal Code 531; Massachusetts, Gen. Stat. ch. 131 sec. 13; Illinois, Rev. Stat. ch. 51 sec. 1; Colorado, Code sec. 4822; Wisconsin, Rev. Stat. sec. 4073. See also, *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128; *Handlin's Estate v. Law*, 34 Ill. App. 84; *State v. Sauer*, 42 Minn. 258; *Com. v. Gorham*, 99 Mass. 420; *Spiegel v. Hays*, 118 N. Y. 660.

2, California, Penal Code sec. 2051; *State v. Johnson*, 57 Cal. 571; *State v. Carolan*, 71 Cal. 195.

3, *Com. v. Sullivan*, 150 Mass. 315.

4, *Hanners v. McClelland*, 74 Iowa 318.

5, *Sieber v. Amunson*, 78 Wis. 679.

6, California, Code Civil Proc. sec. 2051.

7, *Jones v. Duchow*, (Cal.) 23 Pac. Rep. 371.

§ 836. Questions not affecting credibility, but merely tending to prejudice, inadmissible.—It is very clear that, in the exercise of judicial discretion, the court may exclude those *questions* which in no way test the accuracy or credibility of the witness, but are *intended merely to create prejudice* against him. On this principle, it has been held proper to exclude an inquiry as to whether the witness is an "amateur detective,"¹ or whether his general reputation for truth had not lately been impeached in court,² or whether the witness had not acted for his principal in negotiating other usurious notes than that in question,³ or whether or not he was at a bawdy house at a given time,⁴ or whether he was not at a certain time in a given place attending an action for divorce in which adultery was charged.⁵ In an action on warranty, it is proper, within this rule, to exclude inquiry as to how many other similar purchases the plaintiff had made and attempted to set aside.⁶ In an action by a woman for an indecent assault upon herself, it was held improper to ask her if she had not been undergoing medical treatment at a college in the presence of a class.⁷ In an action, where the statute of limitations was pleaded, it was held that the following question was properly excluded: "Do you take advantage of the statute of limitations to avoid paying the plaintiff this demand?"⁸

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So it has been held proper, in an action for personal injury, to exclude the question whether there was any arrangement between the plaintiff and her attorney, whereby the attorney should have a part of the damages recovered,⁹ or whether the plaintiff had made an affidavit of prejudice to obtain a change of venue.¹⁰

1, *People v. Fleming*, 14 N. Y. S. 200; *Yoe v. People*, 49 Ill. 410; *Fonda v. Lape*, 8 N. Y. S. 792, where the question merely tended to show the wealth of one of the parties; *State v. Rollins*, 77 Me. 380, where the question was as to who had employed the witness as a detective; *People v. Cahoon*, 88 Mich. 456. For other illustrations, see sec. 843 *infra*.

2, *Pennsylvania Co. v. Bray*, 125 Ind. 229; *Corkrill v. Hall*, 76 Cal. 192; *State v. Wooderd*, 20 Iowa 541.

3, *Pooler v. Curtiss*, 3 Thomp. (N. Y.) 228.

4, *People v. Tiley*, 84 Cal. 651; *Gorns v. City of Moberly*, 127 Mo. 116, as to his relations with his wife before marriage.

5, *Ephland v. Missouri Pac. Ry. Co.*, 57 Mo. App. 147.

6, *Russell v. Cruttenden*, 53 Conn. 564; *Clark v. Reiniger*, 66 Iowa 507.

7, *Derwin v. Parsons*, 52 Mich. 425; 50 Am. Rep. 262, but it was held not to be a ground for reversal, as the court thought the plaintiff not injured by the evidence.

8, *Marshall v. Morissey*, 6 Ill. App. 542.

9, *McLimans v. Lancaster*, 63 Wis. 596.

10, *McLimans v. Lancaster*, 63 Wis. 596.

1837. Method and extent of cross-examination — Discretion of the court. From the necessity of the case, the *method and extent* of the cross-examination must de-

pend very largely upon the *discretion of the trial judge*; and this is especially true where the object is to test the accuracy and credibility of the witness. If the cross-examination is proceeding beyond those bounds which are proper to test the accuracy and credibility of the witness, or is being needlessly protracted, or is being conducted in a manner which is unfair to the witness, or if it is inconsistent with the decorum of the court room, the *court is not bound to wait for objections* from counsel, but may interfere of its own motion.¹ While the appellate court does not ordinarily review the decisions of the trial court in these matters,² yet the rule is recognized that the right of *cross-examination must not be unduly restricted*; and, if such examination is arbitrarily limited by the court, while being conducted by counsel in a proper manner, it is error.³ Thus, it is error not to permit full cross-examination as to a conversation to which the witness has testified;⁴ and where the issue is whether *fraud* has been committed, it is error for the court not to permit an exhaustive and searching cross-examination of the party against whom the imputation is made.⁵ It is incidental to the rules already stated that it is discretionary with the trial judge to allow or to deny the privilege of *repeating questions* already fully answered.⁶ On the one hand, it may be proper to allow counsel to probe and test the

credibility of the witness by calling for repetition of his answers and by framing the questions in a variety of forms;¹ while, in other cases, it is equally proper for the court to prevent such repetition and the needless waste of time.² As an illustration of the control of the court over the mode of cross-examination, it is proper for the court, if the witness shows a desire to evade the questions, to prevent counsel from making frivolous objections in order to prevent a rapid cross-examination.³

1, Langley v. Wadsworth, 99 N. Y. 61; Com. v. Lyden, 113 Mass. 452; Wallace v. Taunton St. Ry. Co., 119 Mass. 91; Hamilton v. Miller, 46 Kan. 486; Wachstetter v. State, 99 Ind. 290; 50 Am. Rep. 94; Baldwin v. St. Louis Ry. Co., 75 Iowa 297; 9 Am. St. Rep. 479; Storm v. United States, 94 U. S. 76; State v. McGee, 36 La. An. 206; Lockwood v. Rose, 125 Ind. 588; Ci. y of Santa Ana v. Harlin, 99 Cal. 538; Sandell v. Sherman, 107 Cal. 391; Spear v. Sweeney, 88 Wis. 545; People v. Kindra, 102 Mich. 147; Koch v. Sackman-Phillips Inv. Co., 9 Wash. 405; Hamilton v. Hullett, 51 Minn. 208. See articles, 48 Alb. L. Jour. 299; 23 Sol. Jour. & Rep. 523.

2, Allen v. Kirk, 81 Iowa 658; Hamilton v. Miller, 46 Kan. 486; Texas Standard Cotton Oil Co. v. Hanlan, 79 Tex. 678; State v. May, 33 S. C. 39; Spear v. Sweeney, 88 Wis. 545; Noblin v. State, 100 Ala. 13.

3, *In re* Mason, 14 N. Y. S. 434; Patrick v. Crowe, 15 Col. 543. See sec. 821 *supra*, and cases there cited.

4, Patrick v. Crowe, 15 Col. 543; Reiser v. Portere, (Mich.) 63 N. W. Rep. 1041.

5, Kalk v. Fielding, 50 Wis. 339; Anderson v. Walter, 34 Mich. 113.

6, Stanton Co. v. Canfield, 10 Neb. 387; Hughes v.

Ward, 38 Kan. 452; Gutsch v. McIlhargey, 69 Mich. 377; Gulf Ry. Co. v. Pool, 70 Tex. 713; Tift v. Jones, 77 Ga. 181.

7. Beers v. Payment, 95 Mich. 261; Zucker v. Kareles, 88 Mich. 413; Aurora v. Hillman, 90 Ill. 61, where it was held proper to allow repetition, although the witness had said that he could not answer, Jones v. Stevens, 36 Neb. 849.

8. Hughes v. Ward, 38 Kan. 452; Gutsch v. McIlhargey, 69 Mich. 377; Jones v. Stevens, 36 Neb. 849; Gulf Ry. Co. v. Pool, 70 Tex. 713.

9. State v. Duncan, 116 Mo. 288.

§838. **Limitations on right of cross-examination.** — We have seen that broad latitude is generally given in the cross-examination of witnesses to the end that there may be a full investigation of the facts, and that the credibility of the witnesses may be justly ascertained. There are certain other limitations not already mentioned. For example, it is not permissible to put to the witness a *question which assumes that a material fact is proved, when it is not*, or that the witness has testified to things, where in fact he has not.¹ Of course, for still stronger reasons, this practice cannot be permitted on direct examination.² Again it is not permissible to introduce *hearsay* testimony, even under the latitude allowed in cross-examination.³ But it has been held that, *if a party allows* his witness to volunteer *hearsay testimony*, and does not ask to have the same stricken out, he cannot complain of cross-examination concerning such statements.⁴ On

the cross-examination, as a rule, the inquiry should be limited to questions of fact, and the cross-examiner has no right to complain if the court excludes questions calling for the *opinions* of the witnesses as to *questions of moral or legal obligations or the like*.⁵ Nor is it permissible to ask a party on cross-examination, what witnesses he intends to subpoena in the case;⁶ nor does the latitude of cross-examination permit the proof of *written instruments by parol*, for example, if a plaintiff in ejectment claims under a deed conveying metes and bounds, he cannot be asked, on cross-examination, if he purchased by the acre.⁷

1, *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 221; *Sanderlin v. Sanderlin*, 24 Ga. 583; *Haish v. Munday*, 12 Ill. App. 539; *People v. Graham*, 21 Cal. 261; *Carpenter v. Ambrosam*, 20 Ill. 170; *Baltimore Ry. Co. v. Thompson*, 10 Md. 76; *People v. Fong Ah Sing*, 70 Cal. 8; *People v. O'Brien*, 96 Mich. 630; 1 Stark. Ev. 133. Though it may not be ground for reversal, if the question is merely introductory in its nature, *Magee v. State*, 32 Ala. 575. As to the latitude in examining experts, see sec. 391 *supra*.

2, *Klock v. State*, 60 Wis. 574, where the judgment was reversed on this ground. See the cases above cited.

3, *Adams v. Brown*, 16 Ohio St. 75; *State v. Wyse*, 33 S. C. 582; *Pulliam v. Cantrell*, 77 Ga. 563.

4, *Apple v. Commissioners of Marion Co.*, 127 Ind. 553; *Valm v. McKerreghan*, (Mich.) 62 N. W. Rep. 340. See also, *Grimes v. Hill*, 15 Col. 359.

5, *Com. v. Shaw*, 4 Cush. 594; 50 Am. Dec. 813; *Ramadge v. Ryan*, 9 Bing. 333; *Blake v. Stump*, 73 Md. 160, question as to law regarding usage. See sec. 378 *supra*.

6, *Storm v. United States*, 94 U. S. 76.

7, *Bell v. Jamieson*, 102 Mo. 71; *O'Riley v. Clampet*, 53 Minn. 539. See also, *Foss-Schneider Brewing Co. v. McLaughlin*, 5 Ind. App. 415. See secs. 206, 207, 232 *supra*, 850 *infra*.

§ 839. Questions tending to degrade the witness.—In another section, there is a discussion of the rule that a witness cannot be compelled to *criminate* himself by his answers on cross-examination.¹ There is another question having some connection with the same subject which arises much more frequently and which is attended with more difficulty, namely, whether, on cross-examination, a witness can be compelled to answer questions where the answers will tend to *degrade* or *disgrace*, but not to criminate him. This is a question which has given rise to serious conflict. On the one side, it is urged that, as parties are frequently surprised by the witnesses who confront them, there is no other adequate means of ascertaining what credit is due their testimony, and that, if a witness may not be questioned as to his character, the property, liberty or life of a party must often be endangered, and especially in those cases where spies, informers and accomplices are witnesses. On the other side, it is maintained that the obligation to give evidence arises from the oath which every witness takes; that by his oath he binds himself only to speak touching the matters in issue, and that such particular facts, as whether

the witness has been in jail for felony, or suffered some infamous punishment, or the like cannot form any part of the issue, since the party against whom the witness is called would not be allowed to prove such particular facts by other witnesses. It is urged also that it would be an extreme grievance to a witness to be compelled to disclose past transactions of his life which may have since been forgotten, and to expose his character afresh to evil report, when perhaps, by his subsequent good conduct, he may have recovered the good opinion of the world.¹

1, See secs. 887 *et seq. infra*.

2, See the cases in the following sections.

§840. Same—Such questions admissible when material to the issue.—There seems to be general agreement in the view that, where the question calls for any fact which is *material to the issue*, the witness will be compelled to answer, although it may tend to degrade his character, since the consequences of a failure of justice are more serious than the annoyance or humiliation of the witness.¹ For example, in actions for bastardy, the prosecutrix may be asked on cross-examination whether she had sexual intercourse with any other person than the defendant about the time the child was begotten.² So on a charge of adultery, former acts of adultery between the accused and the person named in

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the indictment may be shown.³ The same rule has been applied in actions for seduction, where the statute gives to the female the right of action, as affecting the measure of damages;⁴ and in an action for the sale of lottery tickets, it is relevant to show on cross-examination a former dealing in the same business.⁵ In an action for assault, where, in aggravation of damages, it is alleged that the defendant had carnal intercourse with the plaintiff against her will, it may be shown on cross-examination that the plaintiff has had intercourse with others. Such testimony is received, not only in mitigation of damages, but as a circumstance tending to overcome the probability that force was used, since the fact that the plaintiff had yielded her person to others would raise an inference that she might have yielded to the defendant without much force.⁶

1, *Clementine v. State*, 14 Mo. 112; *Ex parte Rowe*, 7 Cal. 184; *Tayl. Ev. sec. 1459*; *Greenl. Ev. sec. 454*.

2, *Smith v. Yaryan*, 69 Ind. 445; 35 Am. Rep. 232. See secs. 152 *supra*, 846 *infra*.

3, *Com. v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346. See secs. 151 *supra*, 846 *infra*.

4, *Smith v. Yaryan*, 69 Ind. 445; 35 Am. Rep. 232.

5, *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128.

6, *Watry v. Ferber*, 18 Wis. 500; 86 Am. Dec. 789.

§ 841. Same.—Where question calls for immaterial facts.—The question is con-

stantly arising in the court whether a witness may be compelled on cross-examination to answer *questions wholly immaterial* to the issue, which cannot be sustained, unless upon the ground that they will tend to degrade the witness morally, and thus impeach his credit. It would be an utterly hopeless task to attempt to reconcile the authorities on this subject. Messrs. Cowen and Hill in their invaluable notes to Phillips on Evidence say: "There seemsto be, after a century for reflection, about as bright a prospect of this question being settled as when the discussion began."¹ But, although the later decisions on this subject, like the earlier ones, cannot be reconciled, there is a decided tendency toward greater liberality in allowing questions of this character, and toward leaving the matter largely within the *discretion of the trial judge*. Mr. Stephen thus states the present *English rule*: "When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend (1) to test his accuracy, veracity or credibility, or (2) to shake his credit by injuring his character. Witnesses have been compelled to answer such questions, though the matter suggested was irrelevant to the matter in issue, and though the answer was disgraceful to the witness; but it is submitted that the court has a right to exercise a discretion in such

cases, and to refuse to compel such questions to be answered when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify." ¹ The rule thus declared is well illustrated by the celebrated Tichborne trial, in which the issue was whether the claimant had committed perjury by swearing that he was Roger Tichborne. A witness testified that he had made tattoo marks on the arm of Roger Tichborne which were not found on the arm of the claimant. The witness was asked, and was compelled to answer the question whether many years after the tattooing and many years before the occasion on which he was examined, he committed adultery with the wife of one of his friends. ²

1, 2 Cowen & Hill's Notes to Phill. Ev. (3rd ed.) note 383 p. 746.

2, Steph. Ev. art. 129.

3, R. v. Orton vol. 2 p. 719, cited in Steph. Ev. art. 129. See also, Hollingsworth v. State, 53 Ark. 387; People v. Harrison, 93 Mich. 594. See the next section.

§ 842. View that the matter rests in the discretion of the trial judge.—Although it has frequently been declared in this country that a witness cannot be compelled to answer questions which have no bearing upon the issue and which only tend to stigmatize or disgrace him, ¹ yet it will be found from the discussion which follows that the

statement must be accepted with important qualifications, if indeed, it be accepted at all. In this country, the rule has been adopted in many courts of very high authority that the limits of the cross-examination in such cases rest in the sound *discretion of the trial court*. They hold that witnesses may be cross examined as to specific facts, though not pertinent to the issue, which tend to discredit the witness or impeach his moral character and credit, when there is reason to believe that such examination will tend to the ends of justice; but that a cross-examination of this character ought *not to be allowed when it seems unjust to the witness* and uncalled for by the circumstances of the case.² This discretion of the trial judge is to be exercised in view of the evidence already introduced and the testimony of the witness in the direct examination.³ In those jurisdictions where this rule prevails, the discretion of the trial judge is *not subject to review, unless* it appears to have been *abused* to the prejudice of the party complaining.⁴ In order to more fully illustrate the subject, we will refer to some of the decisions in which the question has been discussed. In the following cases, the *disparaging questions* were *allowed* and answers compelled, but the appellate court declined to interfere: Where, on a criminal trial, the defendant, being a witness in his own behalf, was asked if he had

not formerly been indicted and arrested, and whether he had not plead guilty of other offenses;⁵ where, on a trial for larceny, the question was asked of the prisoner: "Have you ever been arrested before for theft,"⁶ or, "How many times have you been arrested;"⁷ where the action was for indecent assault, counsel were allowed to ask the defendant whether he had before been arrested for a similar offense, and whether he had paid money in settlement of such former charge;⁸ where the witness was on trial for assault, whether he had not committed assaults upon other persons;⁹ whether the witness had deserted from the army,¹⁰ in what places he had resided, although this elicited the fact that he had been in jail,¹¹ or that he had been expelled from a fire company,¹² or formed a combination to defraud an insurance company,¹³ or been engaged in the lottery business¹⁴ or in counterfeiting;¹⁵ whether, two years before and in another country, his character had not been shown to be that of a hog-thief,¹⁶ and whether the witness had been in jail or in the penitentiary, and how much of his time had been spent in such places.¹⁷ In an action on a note which the defendant alleged to have been given in compromise of a criminal charge of rape, the woman alleged to have been injured was a witness, and was asked whether she had not admitted on a former trial that she had given signals to the de-

fendant to induce him to come to her house. In passing upon the admissibility of this testimony, the New York court of appeals stated somewhat broadly the view maintained by one class of decisions in this language: "This evidence was competent for the purpose of impeaching the witness. It is the constant practice at the circuit to inquire of a witness if he has not been guilty of a specific offence, for the purpose of impeaching him. It is usually a satisfactory test. If a man admits himself to have been guilty of heinous offences, the jury would justly give him less credit, than if his life had been pure, and his conduct upright. * * * The protection against its abuse is two fold: First, in the privilege of the witness to refuse to answer, and, secondly, in the discretion of the judge."¹⁸ In various later decisions, the broad rule has been declared that a witness may be specially interrogated in regard to any vicious or criminal act of his life, and may be compelled to answer, unless he claims his privilege.¹⁹

1, *State v. Staples*, 47 N. H. 113; 90 Am. Dec. 565; *Lohman v. People*, 1 N. Y. 379; 49 Am. Dec. 340; *Vaughn v. Perrine*, 3 N. J. L. 728; 4 Am. Dec. 411; *Sodusky v. McGee*, 5 J. J. Marsh. (Ky.) 621; *Galbreath v. Eichelberger*, 3 Yeates (Pa.) 515.

2, *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311; *People v. Oyer & Term. Court*, 83 N. Y. 438; *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496; *Watson v. Twombly*, 60 N. H. 491; *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128; *People v. Clark*, 102 N. Y. 735.

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3, *Storm v. United States*, 94 U. S. 76. See the cases above cited.

4, *Great Western Turnpike Co. v. Loomis*, 32 N. Y. 127; 88 Am. Dec. 311; *People v. Oyer & Term. Court*, 83 N. Y. 438; *State v. May*, 33 S. C. 39. See the other cases above cited.

5, *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496.

6, *Brandon v. People*, 42 N. Y. 265. See also, *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302.

7, *Connors v. People*, 50 N. Y. 240; *Hill v. State*, 42 Neb. 503. See also, *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302.

8, *Leland v. Kauth*, 47 Mich. 508; *State v. Martin*, 124 Mo. 514, where a witness was asked how often he had been in jail.

9, *People v. Irving*, 95 N. Y. 541; *People v. Casey*, 72 N. Y. 393; *State v. Sauer*, 42 Minn. 258; *Quigley v. Turner*, 150 Mass. 108. Contra, *Coble v. State*, 31 Ohio St. 100.

10, *People v. Hovey*, 29 Hun (N. Y.) 382; *Gulf C. & S. F. Ry. Co. v. Johnson*, 83 Tex. 628.

11, *State v. Row*, 81 Iowa 138.

12, *Nolan v. Brooklyn Ry. Co.*, 87 N. Y. 63; 41 Am. Rep. 345, in this case the court held the question improper, but that the error was harmless, as the witness answered that he was expelled simply for being absent without leave.

13, *City of South Bend v. Hardy*, 98 Ind. 577.

14, *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128.

15, *People v. Giblin*, 115 N. Y. 196. But see, *Bersch v. State*, 13 Ind. 434; 74 Am. Dec. 263.

16, *Baker v. Trotter*, 73 Ala. 277.

17, *Real v. People*, 42 N. Y. 270; *Lights v. State*, 21 Tex. App. 308; *Mitchell v. Com.*, (Ky.) 14 S. W. Rep. 489.

18, *Shepard v. Parker*, 36 N. Y. 517, 518; *Hill v. State*, 42 Neb. 503; *McLaughlin v. Mencke*, 80 Md. 83. See also, *Real v. People*, 42 N. Y. 270; *Wilbur v. Flood*, 16 Mich. 40; 93 Am. Dec. 203.

* 19, *People v. Webster*, 139 N. Y. 73; *State v. Hack*, 118 Mo 92; *State v. Pratt*, 121 Mo. 566; *Carroll v. State*, 32 Tex. Cr. Rep. 431; *People v. Harrison*, 93 Mich. 594; *Roberts v. Com.*, 94 Ky. 499.

§843. **Same—Illustrations of the exclusion of such questions.**—In the following cases, the disparaging questions were excluded by the trial judge, and the appellate court declined to interfere: Where a witness, on a trial for homicide, was asked whether she was not in the habit of having sexual intercourse with other men than her husband;¹ where a witness was asked whether he had been arrested for conspiring to procure fraudulent pensions;² whether he has been engaged in a certain swindling transaction;³ whether the witness in an action for personal injury had not attempted to defraud an insurance company;⁴ whether he had not improperly approached a certain judicial officer, and whether he had not in a certain election been charged with buying votes;⁵ whether the witness had made statements in other cases showing that he was willing to be bribed;⁶ whether, in some other transaction, the witness had not forged the name of the defendant;⁷ where the prosecutrix in an action for rape was asked if she had had sexual intercourse with other men,⁸ or whether a witness was a prostitute.⁹ A similar rule was held where the inquiry of the witness called for proof of such specific acts as passing coun-

terfeit money,¹⁰ fraudulently procuring the discharge of workmen,¹¹ indulging in illicit sexual intercourse,¹² or whether he had been arrested for beating a woman of the town.¹³ In most of the cases cited in this section, it was held that the ruling was a proper exercise of judicial discretion. While it is impossible to lay down an exact rule on this subject, it seems to be the *general tendency of the decisions* to hold that, where the question on cross-examination relates to a particular act which is collateral and irrelevant to the issue, it is within the sound discretion of the court, where the witness does not claim the privilege to decline, to permit an answer if by affecting the credibility of the witness it will subserve justice, or to sustain the objection, if such purpose will not be promoted by the answer; and, if the answer would not affect the credibility of the witness, the court should sustain the objection, and has no discretion to admit the evidence.

1, *La Beau v. People*, 34 N. Y. 222; *Lohman v. People*, 1 N. Y. 379; 49 Am. Dec. 340, where the action was for abortion, and the question called for a specific act of sexual intercourse.

2, *Marx v. Hilsendeger*, 46 Mich. 336; *Bissell v. Starr*, 32 Mich. 298.

3, *Madden v. Koester*, 52 Iowa 692.

4, *South Bend v. Hardy*, 98 Ind. 577; 49 Am. Rep. 792, where the witness was plaintiff.

5, *Derwin v. Parsons*, 52 Mich. 425; 50 Am. Rep. 262.

6, *Hamilton v. People*, 29 Mich. 173.

- 7, Com. v. Mason, 105 Mass. 163; 7 Am. Rep. 507.
- 8, Com. v. Regan, 105 Mass. 593.
- 9, Holtz v. State, 76 Wis. 99; State v. Coella, 3 Wash. 99.
- 10, Bersch v. State, 13 Ind. 434; 74 Am. Dec. 263.
- 11, People v. Ryan, 55 Hun 214.
- 12, Sage v. State, 127 Ind. 15.
- 13, Jones v. Duchow, (Cal.) 23 Pac. Rep. 371.

§ 844. Cross-examination of party.—

It is the rule which generally prevails that, when a party to an action voluntarily becomes a witness in his own behalf, the *same rules of cross-examination* obtain as in the case of other witnesses.¹ It is, however, held in *some jurisdictions* that, in the discretion of the court, *greater liberty* of cross-examination may be allowed in such cases, in inquiring as to matters not mentioned in the direct examination.² But such latitude is only discretionary and not a right of the adverse party.³ It is well settled that a party, who becomes a witness in his own behalf may be compelled to answer all questions which bear directly or indirectly upon the testimony given in chief, or which test the credibility, knowledge or recollection of the witness, even though *answers* to such questions *might tend to criminate* him.⁴ Although a party by taking the stand as a witness subjects himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party, and his counsel may, in a proper case, raise the

question of *privilege* for his client while he is on the witness stand.⁶ In many of the illustrations cited in former sections, the witnesses were parties to the action, and the decisions already referred to show that, as in other cases, the extent to which collateral questions may be asked on cross-examination to discredit the witness depends very much upon the *discretion of the trial judge*.⁶ In some states, it is broadly held that, on cross-examination, a party may be asked any questions affecting the merits of the controversy, whether the particular transaction asked about has been referred to in the direct examination or not.⁷

1, Clark v. Reese, 35 Cal. 89; Howland v. Jencks, 7 Wis. 57, by statute; State v. Merriman, 34 S. C. 16.

2, Knapp v. Schneider, 24 Wis. 70; Norris v. Cargill, 57 Wis. 251; State v. Buella, 89 Mo. 595.

3, Norris v. Cargill, 57 Wis. 251.

4, Este v. Wilshire, 44 Ohio St. 636; Com. v. Price, 10 Gray 472; 71 Am. Dec. 668; Com. v. Lannan, 13 Allen 564; Sharp v. Hoffman, 79 Cal. 404; State v. Ober, 52 N. H. 459; 12 Am. Rep. 88; Com. v. Nichols, 114 Mass. 285; 16 Am. Rep. 346 and note; Com. v. Smith, 163 Mass. 411; Raines v. State, 88 Ala. 91; Peck v. State, 86 Tenn. 259; Connors v. People, 50 N. Y. 240.

5, People v. Brown, 72 N. Y. 571; 28 Am. Rep. 183.

6, South Bend v. Hardy, 98 Ind. 577; 49 Am. Rep. 792; State v. Phillips, 70 N. C. 462; United States v. Brown, 40 Fed. Rep. 457; Keyes v. State, 122 Ind. 527. But see, State v. Brent, 100 Mo. 531. See secs. 829 *et seq.*, 840 *et seq. supra*.

7, Hay v. Reid, 85 Mich. 296. See secs. 820 *et seq. supra*, and cases there cited.

§845. Same—In criminal cases.—

Where the party becomes a witness in his own behalf in a criminal case, it is generally held that the same general rules obtain as in civil cases. Under the rule which generally prevails in the United States, the *cross-examination* should only extend to *those matters referred to in the direct examination*, subject, of course, to the qualification that, within proper limits, questions tending to discredit the witness may be asked.¹ It has been suggested that there is an added reason for confining the cross-examination of a defendant to the matters stated in the direct examination, since to compel answers to other questions might be deemed a violation of the constitutional provision which exempts him from testifying against himself.² It is clear that, in a criminal case, the accused, if a witness, must answer on cross-examination as to *all matters relevant to his examination-in-chief*. "He cannot claim the advantage of the position of a witness, and at the same time avoid its duties and responsibilities."³ The object of statutes allowing accused persons to testify "is not to protect or assist criminals, but to promote the discovery of the truth."⁴ Thus, if the charge is adultery, the accused may be asked if he has not committed the offense with the person named in the indictment at other times; ⁵ and, on a charge for selling liquor, the defendant, if he becomes a witness, may be

asked as to other sales at about the time of that alleged.⁶ When we come to inquire to what extent a party in a criminal case may be interrogated as to matters which merely tend to degrade him in the estimation of the jury, we find the same conflict which has been pointed out in former sections.⁷ In one class of cases, we find the courts allowing wide latitude to the cross-examiner in interrogating the accused as to the events of his past life, as to *former arrests and convictions* of other offenses, as well as to other *facts tending to disparage his character*.⁸ While, in another class of decisions, the courts adopt the view that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offenses, should in general be limited to matters pertinent to the issue, in order that the accused shall not be convicted for one offense by proof that he may have been guilty of others.⁹ It is clearly impossible to harmonize the judicial decisions in this country upon this subject.

1, *State v. Chamberlain*, 89 Mo. 129, by statute; *State v. Saunders*, 14 Ore. 300; *Mitchell v. State*, 94 Ala. 68; *State v. Anderson*, 126 Mo. 542. See secs. 820 *et seq. supra*, 748 *infra*. See notes, 38 Am. St. Rep. 895; 27 Am. Rep. 140; also article, 4 Crim. L. Mag. 323.

2, *People v. O'Brien*, 66 Cal. 602, by statute. See sec. 748 *supra*. See valuable note, 15 L. R. A. 669.

3, *Brandon v. People*, 42 N. Y. 265; *People v. Russell*, 46 Cal. 121; *People v. Sutherland*, (Mich.) 62 N. W. Rep. 566; *People v. Clark*, 106 Cal. 32; *Com. v. Smith*, 163 Mass.

411. See also, *State v. Kent*, 4 N. Dak. 577. See note, 15 L. R. A. 669.

4, *Com. v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346; *State v. Wells*, 54 Kan. 161.

5, *Com. v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346.

6, *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688.

7, See secs. 842 *et seq. supra*.

8, *Connors v. People*, 50 N. Y. 240, where the prisoner was asked how many times he had been arrested; *Wroe v. State*, 20 Ohio St. 460, charge of murder, accused was asked if he had been arrested before for assault with intent to kill; *People v. Casey*, 72 N. Y. 393, charge of assault with dangerous weapon, the prisoner was asked as to other assaults committed by him; *State v. Pfefferle*, 36 Kan. 90, questions allowed as to former sales of intoxicating liquors; *Brandon v. People*, 42 N. Y. 265, former arrest for theft; *Hanoff v. State*, 37 Ohio St. 178; 41 Am. Rep. 496, as to former indictment and plea of guilty; *Leland v. Kauth*, 47 Mich. 508, as to former charge and settlement thereof; *Reaf v. People*, 42 N. Y. 270, question as to how much time the witness had spent in the penitentiary; *People v. Fong Ching*, 78 Cal. 169, as to former arrests, where the witness had testified in chief as to his past life; *People v. Noelke*, 94 N. Y. 137; 46 Am. Rep. 128, charge of sale of lottery tickets, question as to former dealing in the business; *People v. Giblin*, 115 N. Y. 196, charge of murder, defendant was asked if he had implements of counterfeiting in his possession; *State v. Miller*, 100 Mo. 606, witness asked concerning former convictions; *People v. Rodrigo*, 69 Cal. 61; *State v. Duncan*, 7 Wash. 336, questioned as to flight after alleged crime. See also, *Parker v. State*, 136 Ind. 284; *Baker v. State*, 58 Ark. 573; *People v. Crowley*, 100 Cal. 478. See secs. 839 *et seq. supra*.

9, *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183, where the charge was forgery, the witness was asked how many times he had been arrested, which was objected to on the ground of privilege and other grounds; *People v. Crapo*, 76 N. Y. 288; 32 Am. Rep. 302, the charge was larceny, the defendant was asked as to former arrest for bigamy, no

claim of privilege being made; *People v. Bishop*, 81 Cal. 113, charge of assault, question as to former assaults. See also, *Sharon v. Sharon*, 79 Cal. 633; *People v. Un Dong*, 106 Cal. 83. See secs. 747, 748 *supra*.

§846. **Actions where the chastity of women is in issue.**—We have seen that, in certain civil actions where the chastity of women is in issue, it is relevant to show unchastity by proof of general bad character in that regard.¹ In such cases, it would seem to be only the proper application of the general rules already discussed to require the plaintiff, if a witness, to answer on cross-examination as to any *specific acts showing her unchastity*, unless they should tend to criminate her and her privilege is claimed.² Mr. Stephen lays down the rule that, in *actions for rape* or attempts to ravish, the prosecutrix may be asked whether she has had connection with other men, but that her answer cannot be contradicted,³ and that she may also be asked whether she has had connection with the prisoner on other occasions, but that, if she denies it, she may be contradicted.⁴ In this country, although the prosecutrix may be questioned as to acts of intercourse with the accused, in order to disprove the allegation of force,⁵ there is more doubt whether such questions as to her intercourse with other men are proper. In numerous cases, it is held that, while the chastity of the prosecutrix is in issue and may be attacked by evi-

dence of her general bad character for chastity, it cannot be assailed by specific acts of unchastity with other persons than the accused, even under the latitude given on cross-examination.⁶ But in other cases, the practice is approved.⁷

1, See secs. 150 *et seq. supra*.

2, *Love v. Masoner*, 6 Baxt. (Tenn.) 24; 32 Am. Rep. 522, seduction; *Watry v. Ferber*, 18 Wis. 500; 86 Am. Dec. 789, action for damages for attempt to ravish; *State v. Hack*, 118 Mo. 92. See secs. 840 *et seq. supra*. But see, *Hoffman v. Kemerer*, 44 Pa. St. 452; *Doyle v. Jessup*, 29 Ill. 460.

3, Steph. Ev. art. 134; *R. v. Holmes*, L. R. 1 Cr. C. 334.

4, Steph. Ev. art. 134; *R. v. Martin*, 6 Car. & P. 562.

5, *Woods v. People*, 55 N. Y. 515; 14 Am. Rep. 309; *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132; *State v. Jefferson*, 6 Ired. (N. C.) 305; *People v. Abbot*, 19 Wend. 192; *Exon v. State*, 33 Tex. Cr. Rep. 461.

6, *Com. v. Harris*, 131 Mass. 336; *State v. Forshner*, 43 N. H. 89; 80 Am. Dec. 132; *McCombs v. State*, 8 Ohio St. 643; *Richie v. State*, 58 Ind. 355; *State v. White*, 35 Mo. 500; *State v. Knapp*, 45 N. H. 148; *Rhea v. State*, 100 Ala. 119.

7, See cases cited in note 5 above. As to impeaching the general character of witnesses, see sec. 864 *infra*.

CHAPTER 22.

EXAMINATION OF WITNESSES — continued.

- § 847. Impeachment of witnesses.
- § 848. Impeachment by proof of former contradictory statements.
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- § 852. Denial of statements not necessary to admit contradiction.
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- § 866. Effect of impeachment.
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- § 905. Same, continued.

§ 847. Impeachment of witnesses.—

In former sections, we have seen that cross-examination is a common mode of determining the credibility, the means of knowledge and the degree of accuracy of witnesses, and that it is a common mode of impeaching witnesses to show, by cross-examination, their bias or interest, or their peculiar relations to the parties, or their disparaged character. Witnesses, thus discredited, are sometimes said to be impeached. There are also three *other modes of impeaching the credit of a witness*: (1) By disproving his statements, made in court, by the testimony of other witnesses; (2) By proving statements of the witness, made out of court, inconsistent with or contradicting those made by him on the witness stand; (3) By proving his general bad character for

veracity.¹ The discussion of the first of these modes of impeachment would only involve a repetition of those rules concerning the relevancy and weight of testimony which are elsewhere discussed. Under another head, we have discussed the rule that, in contradicting the statements of a witness, only those statements can be disproved which are material to the issue; and that, if the adverse party calls out opinions on cross-examination, where they are not proper, or other *statements wholly collateral or immaterial* to the issue, he *cannot rebut* or contradict such matters.²

1, Greenl. Ev. sec. 461; Tayl. Ev. sec. 1470. On the general subject of the impeachment of witnesses, see notes, 15 Am. Dec. 99; 73 Am. Dec. 762-777; 21 L. R. A. 418-433; also articles, 16 Cent. L. Jour. 325; 37 Alb. L. Jour. 9; 30 Cent. L. Jour. 241; 24 Cent. L. Jour. 226; 22 Am. L. Rev. 455; 20 Weekly L. Bul. 1; 38 Cent. L. Jour. 146.

2, Elton v. Larkins, 5 Car. & P. 385; Kennett v. Engel, (Mich.) 63 N. W. Rep. 1009; Brackett v. Weeks, 43 Me. 291; Carr v. West End St. Ry. Co., 163 Mass. 360; Combs v. Winchester, 39 N. H. 13; 75 Am. Dec. 203; Carpenter v. Lingenfelter, 42 Neb. 728; Com. v. Mooney, 110 Mass. 99; Swanson v. French, (Iowa) 61 N. W. Rep. 407; Bearss v. Copley, 10 N. Y. 93; Futch v. State, 90 Ga. 472; Patten v. People, 18 Mich. 314; 100 Am. Dec. 173; Denver Tramway Co. v. Owens, 20 Col. 107; People v. Noneela, 99 Cal. 333; Carter v. State, 36 Neb. 481; People v. Murphy, 135 N. Y. 450. For a discussion of this subject, see secs. 827 *et seq. supra*.

§ 848. Impeachment by proof of former contradictory statements.—In former times, when the evidence of witnesses was directly conflicting, it was the practice

to direct that the witnesses should be *confronted*; and an English author cites an instance in which four witnesses were placed together in the box for this purpose.¹ Although this practice is still preserved in some of the English courts,² it does not prevail in this country, and juries are deprived of the advantage of this direct comparison of the demeanor of the witnesses. But there is hardly any more familiar practice in judicial procedure than that of impeaching witnesses by *proof* of their *former statements* which are *inconsistent with their present testimony*. Since such attempted impeachment is a direct attack upon the testimony of the witness, and may result in serious consequences, it is important that the practice should be so regular that the witness may have full *opportunity to admit, deny or explain* any statement which is thus assailed.³ The authorities, except those in some of the New England states, are almost unanimous to the effect that, before a witness can be impeached by proof that he has made statements contradicting or differing from the testimony given by him, a foundation must be laid *by interrogating him as to whether he had made such statements*. Mr. Stephen thus states the rule of procedure in such cases: "Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made **any** former statement relative to the subject mat-

ter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if *he does not distinctly admit* that he has made such a statement, proof may be given that he did in fact make it."⁴ It has frequently been declared that, in order to designate sufficiently the circumstance of the statement, the witness should be asked as to the *time, place and persons* involved in the contradiction.⁵ Although the conduct of the witness as to matters having no connection with the case is generally irrelevant, it is allowable to ask the witness on cross-examination, not only concerning his contradictory statements, but concerning his *actions*, if they have been *inconsistent with his statements, on the witness stand*.⁶

1, Tayl. Ev. sec. 1478; *Annesley v. Lord Anglesea*, 17 How. St. Tr. 1350. See note, 73 Am. Dec. 762.

2, *Enticknap v. Rice*, 34 L. J. (Pr. & Mat.) 110; 4 Swab. & T. 136.

3, *Queen's Case*, 2 Brod. & B. 213. See also cases cited below. See valuable note, 21 L. R. A., 428.

4, Steph. Ev. art. 131; *The Charles Morgan*, 115 U. S. 69; *Conrad v. Griffey*, 16 How. 38; *Hart v. Hudson Riv. Bridge Co.*, 84 N. Y. 56; *Pittsburg Ry. Co. v. Andrews*, 39 Md. 329; *Lawler v. McPheeters*, 73 Ind. 577; *Dufresne v. Weise*, 46 Wis. 290; *State v. Grant*, 79 Mo. 113; *Cole v. State*, 6 Baxt. (Tenn.) 239; *People v. Ah Lee Doon*, 97 Cal. 171; *People v. Devine*, 44 Cal. 452; *Horton v. Chadbourne*, 31 Minn. 322; *Gillyard v. State*, 98 Ala. 59; *Sheppard v. Yocum*, 10 Ore. 402; *State v. McLaughlin*, 44 Iowa 82;

Henderson v. State, 70 Ala. 23; 45 Am. Rep. 72; Griffith v. State, 37 Ark. 324; Matthis v. State, 33 Ga. 24; Winslow v. Newland, 45 Ill. 145; Waterman v. Chicago & A. Ry. Co., 82 Wis. 613; Keeley v. Layne, 29 Kan. 218, State v. Johnson, 35 La. An. 871; Skelton v. Fenton Light Co., 100 Mich. 87; Smith v. People, 2 Mich. 415; State v. Patterson, 2 Ired. (N. C.) 346; 38 Am. Dec. 699; King v. Wicks, 20 Ohio 87; State v. Glynn, 51 Vt. 577; State v. Cleary, 40 Kan. 287; Wilson v. Wilson, 137 Pa. St. 269; Tobin v. Jones, 143 Mass. 448. See sec. 859 *infra*.

5, Angus v. Smith, 1 Moody & M. 473; Kimball v. Davis, 19 Wend. 437; Hart v. Hudson Riv. Bridge Co., 84 N. Y. 56; Pendleton v. Empire Dressing Co., 19 N. Y. 13; Mattox v. United States, 156 U. S. 237; People v. Devine, 44 Cal. 452; State v. Jones, 44 La. An. 960; Chicago, M. & St. P. Ry. Co. v. Artery, 137 U. S. 507; Sieber v. Amunson, 78 Wis. 679; Koehler v. Buhl, 94 Mich. 496; Hunter v. Gibbs, 79 Wis. 70; Com. v. Smith, 163 Mass. 411; Aneals v. People, 134 Ill. 401; Hanscom v. Burmoad, 35 Neb. 504; Hooper v. Browning, 19 Neb. 420; Whitaker v. State, 79 Ga. 87. In a few states, however, the prevailing rule has not been adopted, New Portland v. Kingfield, 55 Me. 172; Blake v. Stoddard, 107 Mass. 111; Nute v. Nute, 41 N. H. 60. While, in a few other states, it is held to rest in the discretion of the court, Hedge v. Clapp, 22 Conn. 262; 58 Am. Dec. 424; Walden v. Finch, 70 Pa. St. 460. It was held in Nebraska that, if counsel failed to object to the question, the jury might consider such evidence and base their verdict on it, if sufficient, Cool v. Roche, 20 Neb. 550.

6, Yeaw v. Williams, 15 R. I. 20; Miller v. Smith, 112 Mass. 470; State v. Lurch, 12 Ore. 104; New Gloucester v. Bridgham, 28 Me. 60; Hyland v. Milner, 99 Ind. 308; Markel v. Monday, 13 Neb. 322.

§ 849. Same — Laying foundation.—

Although the attention of the witness should be called to the time of the alleged statement, *exact precision* in this regard is *not necessary*. It suffices, if there is reasonable certainty, or

if it is clear that the attention of the witness is called to the conversation in such manner that it is identified by him;¹ and, if the circumstances stated in the question are such as to describe the occasion with reasonable certainty, a variance as to the time is immaterial.² On the same principle, if the question designates the *person or the place* with reasonable certainty, it is sufficient.³ It is not necessary, in laying the foundation, to give the *exact language* of the alleged statement; the *substance is sufficient*;⁴ and the *form* in which the question should be stated rests somewhat in the *discretion of the court*.⁵ But the witness must be asked if he has made the statement alleged,⁶ and he should answer categorically, but should, of course, be *allowed to explain* when re-examined.⁷ It is the practice, which generally prevails, to ask the impeaching witness the direct *question in leading form*, whether the other witness used the language attributed to him.⁸ But it has been held in other cases that the impeaching witness should first be left to exhaust his memory on the subject without the aid of leading questions, in order that the jury may see how far he answers from memory and how far from the question.⁹ In view of the rules and illustrations already given, it is hardly necessary to add that *no foundation* is laid for impeachment of this kind *by mere general questions*, such as by asking the witness if he

has made given statements, without thus designating the occasion;¹⁰ and declarations, to which the attention of the witness has not been called, cannot be received in evidence.¹¹ Of course, the failure to lay a foundation for impeachment may be *waived* by failing to make objection in proper form.¹² The principle under discussion applies where the alleged contradictory *statements* were made under oath *at some other trial*, as the same reason exists for allowing the witness an opportunity to *'explain'*.¹³ So these contradictory statements are admissible, although made after the occurrence which is the subject matter of the suit.¹⁴ The general rule also applies where the *witness whose testimony is attacked is deceased or absent*. Thus, where the testimony given on a former trial by a witness, since deceased, is read to the jury, it is incompetent to show that such witness had stated, since the trial, that such testimony was untrue.¹⁵

1. *State v. Jones*, 44 La. An. 960; *Granning v. Swenson*, 49 Minn. 381; *Young v. Brady*, 94 Cal. 128; *McCulloch v. Dobson*, 133 N. Y. 114; *Union Parish v. Trimble*, 33 La. An. 1073; *Wood River Bank v. Kelley*, 29 Neb. 590; *Hunter v. Gibbs*, 79 Wis. 70. See also, *Sieber v. Amunson*, 78 Wis. 679; *State v. Walters*, 7 Wash. 246. It has been held sufficient to name the month of a given year, *Bennett v. O'Bryne*, 23 Ind. 604; *Evansville Ry. Co. v. Montgomery*, 85 Ind. 494; *Meyer v. Appel*, 13 Ill. App. 87.

2. *Nelson v. Iverson*, 24 Ala. 9; 60 Am. Dec. 442, where the time was designated as in the spring of a given year, when it was in fact in February; *Lawler v. McPheeters*, 73

Ind. 577; *Brown v. State*, 72 Md. 468; *Hanscom v. Burmood*, 35 Neb. 504; *Bonelli v. Bowen*, 70 Miss. 142; *Rockwell v. Brown*, 36 N. Y. 207.

3, *Gross v. State*, 11 Tex. App. 364, where the designation was "the examining trial in this cause." See also the cases above cited.

4, *Nelson v. Iverson*, 24 Ala. 9; 60 Am. Dec. 442; *Armstrong v. Huffstutler*, 19 Ala. 51; *Gould v. Norfolk Lead Co.*, 9 Cush. 338; 57 Am. Dec. 50.

5, *Sloan v. New York Cent. Ry. Co.*, 45 N. Y. 125.

6, *Welch v. Abbott*, 72 Wis. 512; *Boeker v. Hess*, 34 Ill. App. 332.

7, *Higgins v. Carlton*, 28 Md. 115; 92 Am. Dec. 666; *Baker v. Joseph*, 16 Cal. 173; *Hooper v. Browning*, 19 Neb. 420; *Whitaker v. State*, 79 Ga. 87.

8, *Bressler v. People*, 117 Ill. 422.

9, *Farmers Ins. Co. v. Bair*, 87 Pa. St. 124; *People v. Ah Yute*, 60 Cal. 95; *Hinton v. Cream City Ry. Co.*, 65 Wis. 323. See sec. 818 *supra*.

10, *Hallett v. Cousens*, 2 Moody & Rob. 238; *Allen v. State*, 28 Ga. 395; 73 Am. Dec. 760; *Wood v. State*, 31 Fla. 221, where it was held not to be error to refuse to permit a leading question; *Parkenson v. Bemis*, 153 Mass. 280, where it was held harmless error to allow a general question as to the conversation in issue.

11, *Standard Oil Co. v. Van Etten*, 107 U. S. 325; *State v. Kinley*, 43 Iowa 294. See also cases cited above.

12, *McCulloch v. Dobson*, 133 N. Y. 114; *Hanscom v. Burmood*, 35 Neb. 504. See also, *Bonelli v. Bowen*, 70 Miss. 142; *Quincy Horse Ry. Co. v. Gnuse*, 137 Ill. 264; *Jackson v. Swope*, 134 Ind. 111.

13, *People v. Devine*, 44 Cal. 452; *People v. Jackson*, 3 Park. Cr. (N. Y.) 590; *Cool v. Roche*, 20 Neb. 550.

14, *Taylor v. Morgan*, 61 Ga. 46; *Ray v. Bell*, 24 Ill. 444; *State v. Ostlander*, 18 Iowa 435; *Wacha v. Brown*, 78 Iowa 432; *Runyan v. Price*, 15 Ohio St. 1; 86 Am. Dec. 459, where the witness was deceased and the rule was applied.

15, Craft v. Com., 81 Ky. 250; 50 Am. Rep. 160; Runyan v. Price, 15 Ohio St. 1; 86 Am. Dec. 459; Eppert v. Hall, 133 Ind. 417; Pruitt v. State, 92 Ala. 41; Ayers v. Watson, 132 U. S. 394. The same is true where witness has become insane, Stewart v. State, (Tex.) 26 S. W. Rep. 203. See valuable note, 21 L. R. A. 426. See sec. 857 *infra*.

§ 850. **Contradictory written statements—Mode of procedure.**—Witnesses may be impeached by producing their *written statements*, for example, their letters, affidavits, depositions or the like, which are *inconsistent with the testimony* given at the trial.¹ Thus, where the witness testified that the plaintiff had been discharged from service for neglect of duty, a letter of the witness stating that the plaintiff had performed efficient service was held admissible.² But the witness cannot, in the first instance, be asked as to the contents of what he has thus written, since this would be a violation of the familiar rule as to *best evidence*.³ If the question is asked whether the witness had made certain representations, his counsel have the right to ascertain whether the representation or statement was written or oral, and, if it appears to have been *in writing*, the paper should be *produced* before he is compelled to answer.⁴ The witness should be allowed to examine the letter or other writing, and be asked if it was written or authorized by him.⁵ *The practice* is thus stated by Professor Greenleaf: "But it is not required that the whole paper should be shown to the wit-

ness. Two or three lines only of a letter may be exhibited to him, and he may be asked whether he wrote the part exhibited. If he denies or does not admit that he wrote that part, he cannot be examined as to the contents of such letter, for the reason already given; nor is the opposite counsel entitled, in that case, to look at the paper. And, if he admits the letter to be his writing, he cannot be asked whether statements, such as the counsel may suggest, are contained in it, but the whole letter must be read, as the only competent evidence of that fact." ⁶ The same author thus states the practice *in case the paper in question is lost*: "In such case, it would seem that regularly the proof of the loss of the paper should first be offered, and that then the witness may be cross-examined as to its contents, after which he may be contradicted by secondary evidence of the contents of the paper. But where this course would be likely to occasion inconvenience by disturbing the regular progress of the cause and distracting the attention, it will always be in the power of the judge, in his discretion, to prevent this inconvenience by postponing the examination, as to this point, to some other stage of the cause." ⁷ If the authenticity of the writing is admitted, *the cross-examining party may introduce the same in evidence at the proper time, which is after the opening of his own proofs.* ⁸ The other

party has no right to insist that the writing shall be offered in evidence during the examination of the witness, in order that he may then explain, although, in the discretion of the court, this may be permitted.⁹ In the discretion of the court, the cross-examiner may, *at the time of producing the writing*, offer it in evidence as a part of his own case.¹⁰ It is *not necessary* to call the attention of the witness to the particular passages in the writing which are to be introduced in evidence, nor to *examine him as to its contents*;¹¹ nor is it necessary, when the writing is admitted by the witness, to call as a witness the person to whom the statement is made.¹² "All the law requires is that the memory of the witness shall be so refreshed by the necessary inquiries as to enable him to explain, if he can and desires to do so; whether this has been done is for the court to determine before the impeaching evidence is admitted."¹³ A witness may, however, be cross-examined as to the contents of a *writing* which is merely incidental and *collateral to the issue*, and which does not affect the merits of the controversy between the parties, for the purpose of testing his credibility, although no notice to produce the paper has been given.¹⁴ It is a common practice and no violation of the rule to ask a witness whether he testified to a given statement at another trial, without producing the record of such trial.

1, *Floyd v. Thomas*, 108 N. C. 93, answer in another case; *Com. v. Snee*, 145 Mass. 351, verified complaint; *Tabor v. Judd*, 62 N. H. 288, letter; *Hosmer v. Groat*, 143 Mass. 16, letter; *Bellows v. Sowles*, 59 Vt. 63, petition for a new trial. But in *Terry v. Shively*, 93 Ind. 413, the bill of exceptions in another case was not allowed, the witness not being a party. See note, 73 Am. Dec. 770.

2, *Western Ins. Co. v. Boughton*, 136 Ill. 317; *People v. Cassidey*, 14 N. Y. S. 349.

3, *The Charles Morgan*, 115 U. S. 69; *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U. S. 507; *Cropsey v. Averill*, 8 Neb. 151; *Bellinger v. People*, 8 Wend. 595; *Richmond v. Sundberg*, 77 Iowa 255; *People v. Ching Hing Chang*, 74 Cal. 389; *Gunter v. State*, 83 Ala. 96; *Gaffney v. People*, 50 N. Y. 416; *Horton v. Chadbourn*, 31 Minn. 322. In England this rule has been changed by statute, *Steph. Ev. art. 132*; 17 & 18 Vict. ch. 125 sec. 24; 28 Vict. ch. 18 sec. 5. See sec. 232 *supra*, as to the best evidence of a writing.

4, *Queen's Case*, 2 Brod. & B. 292; *State v. Callegari*, 41 La. An. 578; *Auger Steel Axle & G. Co. v. Whittier*, 117 Mass. 451; *Dunbar v. McGill*, 69 Mich. 297; *Gregory v. Morris*, 96 U. S. 619; *Gaffney v. People*, 50 N. Y. 416; 1 Greenl. Ev. sec. 463. So a party may object, though a witness does not, to a question whether the latter had made certain statements in an affidavit, which was not produced, *Newcomb v. Griswold*, 24 N. Y. 301; *Sainthill v. Bound*, 4 Esp. 74. See also, *Ridley v. Gyde*, 1 Moody & Rob. 197. A witness should be shown a will, when asked to testify as to alterations therein, *Brown v. Hughes*, 1 Fost. & F. 299; *Glenn v. Gleason*, 61 Iowa 28.

5, *Peck v. Parchen*, 52 Iowa 46; *Cooper v. State*, 90 Ala. 641; *Perishable Freight Co. v. O'Neill*, 41 Ill. App. 423; *Hammond v. Dike*, 42 Minn. 273. See also cases last cited.

6, Greenl. Ev. sec. 463; *Queen's Case*, 2 Brod. & B. 288; *Lightfoot v. People*, 16 Mich. 507; *Wills v. State*, 74 Ala. 21. But see, *Glenn v. Gleason*, 61 Iowa 28.

7, Greenl. Ev. sec. 464; *McDonnell v. Evans*, 16 Jur. 103; *Horton v. Chadbourn*, 31 Minn. 322.

8, *Romertze v. East River Bank*, 49 N. Y. 577. An im-

peaching letter or statement may be introduced without examining the witness as to its contents, *State v. Stein*, 79 Mo. 330.

9, *Romertze v. East River Bank*, 49 N. Y. 577; *Hammond v. Dike*, 42 Minn. 273.

10, *Romertze v. East River Bank*, 49 N. Y. 577; *Greenl. Ev. sec. 463*.

11, *The Charles Morgan*, 115 U. S. 69; *Romertze v. East River Bank*, 49 N. Y. 577; *State v. Stein*, 79 Mo. 330.

12, *Chicago, M. & St. P. Ry. Co. v. Artery*, 137 U. S. 507.

13, *The Charles Morgan*, 115 U. S. 69.

14, *Klein v. Russell*, 19 Wall. 433; *Toplitz v. Hedden*, 146 U. S. 252.

§ 851. *Same, continued.*— Although it has sometimes been held *in the case of depositions* that it is unnecessary to call the attention of the witness to such a deposition, and that it is sufficient to prove its authenticity,¹ yet, by the weight of authority and on principle, the witness should have his attention called to the alleged contradictory statements, whether oral or written, in order that he may have the *opportunity to explain*.² If there are *two depositions by the same witness* in the same action, his attention should be called in the second action to the statements made in the other, in order to lay a foundation for impeachment.³ *If the witness is dead* and there has been no foundation laid, his statements cannot be impeached by showing his contradictory statements or depositions. Said Mr.

Justice Miller: "While the courts have been somewhat liberal in giving the opposing party an opportunity to present to the witness the matter in which they propose to contradict him, even going so far as to permit him to be recalled and cross-examined on that subject after he has left the stand, it is believed that, in no case, has any court deliberately held that, after the witness's testimony has been taken, committed to writing and used in court, and, by his death, he is placed beyond the reach of any power of explanation, then, in another trial, such contradictory declarations, whether by deposition or otherwise, can be used to impeach his testimony."⁴ Although part of a statement, deposition, or other writing may be received for the purpose of impeaching the witness, of course, those *other parts which tend to explain* inconsistencies or remove discrepancies should also be received, if offered.⁵

1, Bryan v. Walton, 14 Ga. 185; Molyneaux v. Collier, 30 Ga. 731; Ecker v. McAllister, 45 Md. 290; Clapp v. Wilson, 5 Den. 285; McKinney v. Neal, 1 McLean (U. S.) 540. See note, 73 Am. Dec. 767.

2, The Charles Morgan, 115 U. S. 69; Romertze v. East River Bank, 49 N. Y. 577; Bradford v. Barclay, 39 Ala. 33; Ryan v. People, (Col.) 40 Pac. Rep. 775; Hughes v. Wilkinson, 35 Ala. 453; Greer v. Higgins, 20 Kan. 420; Johnson v. Chicago Ry. Co., 58 Iowa 348; Unis v. Charlton, 12 Gratt. (Va.) 484; Hammond v. Dike, 42 Minn. 273; 18 Am. St. Rep. 503; Richmond v. Sundberg, 77 Iowa 255; People v. Lee Chuck, 78 Cal. 317, in this last case it was so held, where the statements on a former trial had been reduced to

writing. The same rule was adopted in *Kennedy v. State*, 85 Ala. 326.

3, *Samuels v. Griffith*, 13 Iowa 103. See sec. 849 *supra*.

4, *Ayers v. Watson*, 132 U. S. 404; *Mattox v. United States*, 156 U. S. 237; *State v. Johnson*, 35 La. An. 871; *Runyan v. Price*, 15 Ohio St. 1; 86 Am. Dec. 459; *Craft v. Com.*, 81 Ky. 250; 50 Am. Rep. 160. But see, *Patterson v. Dushane*, 137 Pa. St. 23, where statement of a deceased witness, made subsequent to and contradicting a deposition, were received in evidence.

5, *Dunbar v. McGill*, 69 Mich. 297.

§ 852. Denial of statements not necessary to admit contradiction.—It is not necessary, in order to admit the impeaching statements, that the witness should deny having made them.¹ If he *does not remember* having made the statements and will *neither admit nor deny* having done so, the foundation is sufficiently laid, after the occasion and circumstances are designated as already pointed out.² Unless the witness *distinctly admits* having made the statements imputed to him, the testimony should be received, if the proper foundation is laid; otherwise the witness, on the pretence of a failure of memory, might escape deserved exposure.³ Of course, if the statements are thus admitted, there is no reason for further proof on the subject; and none should be received.⁴ It is not necessary that a *direct contradiction* should be proved in such cases. If there is *inconsistency or conflict* between the statements in any material respect, it is for the jury to determine the

effect of such inconsistency upon the credit of the witness.⁵ The testimony of the impeaching witness is admissible although he is not able to state all of the conversation; he may state the inconsistent part.⁶ Nor is it proper to charge the jury that the former statement of the witness should not affect his credit, unless they believe it to have been intentionally false.⁷

1, *Crowley v. Page*, 7 Car. & P. 789. See also cases cited below. But such impeaching testimony was not allowed, where the witness said that his statement had practically amounted to the same thing, *State v. Baldwin*, 36 Kan. 1.

2, *Payne v. State*, 60 Ala. 80; *Jones v. People*, 2 Col. 351; *Billings v. State*, 52 Ark. 303; *Sealy v. State*, 1 Ga. 213; 44 Am. Dec. 641; *State v. Sullivan*, 43 S. C. 205; *Meyncke v. State*, 68 Ind. 401; *Smith v. People*, 2 Mich. 415; *Nute v. Nute*, 41 N. H. 60; *Gregg v. Jamison*, 55 Pa. St. 468; *People v. Jackson*, 3 Park. Cr. (N. Y.) 590; *Ray v. Bell*, 24 Ill. 444; *Lewis v. State*, 4 Kan. 296; *Chapman v. Coffin*, 14 Gray 454; *Janeway v. State*, 1 Head (Tenn.) 130; *Heddles v. Chicago & N. W. Ry. Co.*, 74 Wis. 239. But in a few states this rule is not approved, *Wiggins v. Holman*, 5 Ind. 502; *McVey v. Blair*, 7 Ind. 590; *State v. Reed*, 60 Me. 550; *Robinson v. Pitzer*, 3 W. Va. 335; *Levy v. State*, 28 Tex. App. 203; *Billings v. State*, 52 Ark. 303.

3, See sec. 848 *supra*. See also the cases above cited.

4, *Lightfoot v. People*, 16 Mich. 507; *State v. Tickle*, 13 Nev. 502.

5, *Tinklepaugh v. Rounds*, 24 Minn. 298; *Seller v. Jenkins*, 97 Ind. 430; *Smith v. State*, 92 Ala. 69.

6, *Edwards v. Sullivan*, 8 Ired. (N. C.) 302.

7, *Craig v. Rohrer*, 63 Ill. 325.

§ 853. **Impeachment—Expressions of opinion—Of hostility.**—We have seen that, in general, the cross-examination cannot extend to mere matters of opinion.¹ Nor is it competent to impeach the statements of a witness, as to matters of fact, by producing other witnesses to show that he has *expressed an opinion* as to the merits of the case.² Of course, if it is a proper subject for *opinion evidence*, a witness who expresses opinions may be impeached after the proper foundation is laid by proof that he has formerly expressed opinions inconsistent with his testimony.³ We have seen that witnesses may be fully cross-examined to ascertain whether they are *impartial*, and that their statements in that regard are subject to contradiction.⁴ It is generally held that, in order to admit proof that the witness has made declarations or performed acts showing his hostility toward one of the parties or his bias in the action, the *foundation should be laid* by calling the attention of the witness to such statements or acts on his cross-examination, so that he may have an opportunity for explanation.⁵ In an action where the impeaching question was objected to as too indefinite to lay a proper foundation, and counsel stated that he did not propose to impeach the witness, and the objection was sustained, it was held that the disclaimer in its general form was broad enough to cover every form of impeaching the

credit of the witness, and that it could not be narrowed in the appellate court.⁶

1, See sec. 838 *supra*. See note, 21 L. R. A. 418.

2, Com. v. Mooney, 110 Mass. 99; Sloan v. Edwards, 61 Md. 89.

3, Ripon v. Bittel, 30 Wis. 614; Waterman v. Chicago & A. Ry. Co., 82 Wis. 613; Daniels v. Conrad, 4 Leigh (Va.) 401; Sanderson v. Nashua, 44 N. H. 492; Dalton's Appeal, 59 Mich. 352; San Diego Land Co. v. Neale, 88 Cal. 50, as to questions of value; Staser v. Hogan, 120 Ind. 207, as to sanity of a testator. See also, Cochran v. Amsden, 104 Ind. 282; Lane v. Bryant, 9 Gray 245; 69 Am. Dec. 282; Hubbell v. Bissell, 2 Allen 196. See sec. 391 *supra*.

4, See sec. 829 *et seq. supra*.

5, Baker v. Joseph, 16 Cal. 173; Edwards v. Sullivan, 8 Ired. (N. C.) 302; State v. Stewart, 11 Ore. 52; Booker v. State, 4 Tex. App. 564; Bates v. Holliday, 31 Mo. App. 162, in this case it was so held, where there was an attempt to tamper with another witness; Scott v. State, 64 Ind. 400. For cases holding another rule, see sec. 830 *supra*.

6, Oil Co. v. Van Etten, 107 U. S. 325.

§ 854. **Ordinary rules do not apply in case of parties.**—Of course, the statements of a *party*, made out of court, are admitted upon a wholly different principle from that which governs the declarations we have been considering. Such statements are *admissions and independent testimony*; and *no foundation is necessary* for their introduction as evidence.¹ In such a case, the counsel for the adverse party has the option to call the attention of the witness to the subject matter on the cross-examination, or to wait and prove the declarations by his own witnesses in the

first instance.² But it should be noted that it has been held in some states that the same foundation should be laid for the impeachment of a party as in the case of other witnesses.³

1, *Martineau v. May*, 18 Wis. 54; *Martin v. Barnes*, 7 Wis. 239; *Cravens v. Bennett*, 17 Col. 419; *Collins v. Mack*, 31 Ark. 684; *Kreiter v. Bomberger*, 82 Pa. St. 59; *Klug v. State*, 77 Ga. 734; *Lucas v. Flinn*, 35 Iowa 9; *State v. Freeman*, 43 S. C. 105; *Rose v. Otis*, 18 Col. 59. As to the impeachment of the defendant, see article, 24 Cent. L. Jour. 227; also note, 21 L. R. A. 418.

2, *Collins v. Mack*, 31 Ark. 684.

3, *Kelsey v. Layne*, 28 Kan. 218; *Davis v. Franke*, 33 Gratt. (Va.) 413; *Varona v. Socarras*, 8 Abb. Pr. (N. Y.) 302.

§ 855. Right to impeach not a matter of discretion.—In view of the rules heretofore stated, it is hardly necessary to add that not every inconsistent statement or act of a witness can be offered in evidence by way of impeachment of his statements made on cross-examination. Such act or declaration must be *relevant to the issue*.¹ But when the impeaching statements, so offered, are material to the issue, their admissibility does not depend upon the discretion of the court. It is *the right of a party* both to lay the foundation for impeachment by interrogating the witness on cross-examination, and to introduce the impeaching testimony; and, if either of these rights is refused, such *refusal is error*.² The question whether a witness is

impeached or not is *for the jury*, and they may give credit to the witness notwithstanding that former contradictory statements are shown.¹ In such case, it is error for the court to charge that the testimony is unimpeached.⁴

1, Clinton v. State, 33 Ohio St. 27; Washington v. State, 63 Ala. 189; People v. Furtado, 57 Cal. 345; Morris v. Atlantic Ave. Ry. Co., 116 N. Y. 652; Fogleman v. State, 32 Ind. 145; Madden v. Koester, 52 Iowa 592; State v. Benner, 64 Me. 267; Kaler v. Builders Ins. Co., 120 Mass. 333; Howard v. Patrick, 43 Mich. 121; State v. Spaulding, 34 Minn. 361; Harper v. Indianapolis Ry. Co., 47 Mo. 567; 4 Am. Rep. 353; Gandolfo v. Appleton, 40 N. Y. 533; Goodall v. State, 1 Ore. 333; 80 Am. Dec. 396; Brite v. State, 10 Tex. App. 368. See also, Becker v. Haynes, 29 Fed. Rep. 441. See sec. 827 *supra*.

2, Schulz v. Third Ave. Ry. Co., 89 N. Y. 242; Joseph v. Com., (Ky.) 1 S. W. Rep. 4; Hylan v. Milner, 99 Ind. 308; Wilson v. Wilson, 137 Pa. St. 269.

3, United States v. Hall, 44 Fed. Rep. 864, where it was held that, if the former sworn statement of the witness was made under duress, it should not affect his credibility.

4, Smith v. State, 92 Ala. 69.

§ 856. Impeachment—Witness may explain on re-examination.—Since the principal object of the rule requiring the cross-examiner to lay the foundation for impeachment by interrogating the witness as to his former statements is to prevent injustice to the witness by giving him an *opportunity* to recollect the facts and *to explain* any apparent inconsistency, it follows that the opportunity should not be denied on the re-examination. The witness may then be allowed

to re-affirm or explain such statements, their meaning and design, and to give the circumstances and influences under which they were made.¹ If the witness has denied making the impeaching statements, he *may state what was actually said* in the conversation referred to and give his version of it.² But this is the *end of the inquiry*; the court is not bound to receive the evidence of other witnesses as to such conversation, to sustain the testimony of the one sought to be impeached;³ nor is it proper to admit the hearsay statements of other persons to the witness whom it is sought to impeach.⁴ If counsel have neglected to lay the foundation for cross-examination, the court, in its discretion, may allow the *witness to be recalled* for that purpose;⁵ and where the witness has been so recalled, it is error to rule out the impeaching evidence on the ground that the party had made the witness his own by recalling him.⁶ So the contradictory statements made by a witness, after he was sworn and during the trial, may be shown.⁷

1, Dufresne v. Weise, 46 Wis. 290; State v. Reed, 89 Mo. 168; Smith v. Weeks, 54 Iowa 411; Hoover v. Cary, 86 Iowa 494; Bressler v. People, 117 Ill. 422; State v. Claire, 41 La. An. 1067; State v. Reed, 62 Me. 129; State v. Hendricks, (Kan.) 4 Pac. Rep. 1050. It was held to be within the discretion of the trial court, whether the witness, so impeached, may be allowed to again deny the contradictory statements, Sterling v. Sterling, 64 Md. 138; or to merely repeat his former statement, Archer v. Helm, 70 Miss. 874. See article, 38 Cent. L. Jour. 321.

2, Haley v. State, 63 Ala. 83; Henderson v. State, 70 Ala.

29; *State v. Winkley*, 14 N. H. 480; *State v. Reed*, 89 Mo. 168.

3, *Dufresne v. Weise*, 46 Wis. 290.

4, *State v. Wyse*, 33 S. C. 582.

5, *Rothrock v. Gallher*, 91 Pa. St. 108; *Treadway v. State*, 1 Tex. App. 668. The refusal to allow this may be an abuse of discretion, *Grose v. State*, 11 Tex. App. 364.

6, *Perkins v. State*, 78 Wis. 551; *Joseph v. Com.*, (Ky.) 1 S. W. Rep. 4; *Bennett v. State*, 28 Tex. App. 539; *State v. Goodrich*, 19 Vt. 116; 47 Am. Dec. 676; *Hyland v. Milner*, 99 Ind. 308; *Com. v. Hunt*, 4 Gray 421.

7, *People v. Moore*, 15 Wend. 419.

§ 857. **A party cannot impeach his own witness.**—It was the established rule of the common law that a party could not give general evidence that his own witness was unworthy of belief. This rule rested on the theory that a *person who produces a witness vouches for him* to some extent as being not wholly unworthy of credit, and that a direct attack upon the veracity of the witness "would enable the party to destroy the witness, if he spoke against him, and to make him a good witness, if he spoke for him, with the means in his hand of destroying his credit, if he spoke against him."¹ It was a more doubtful question at common law whether a party could prove by other testimony that one of his witnesses had previously made *inconsistent or contradictory statements*. On the one hand, it was urged that, by such a practice, the party was allowed to discredit his

own witness, and that it was *mala fides* towards the witness and the court; it was also urged that the statement which was so received, only for the purpose of contradicting the witness, might be understood by the jury as substantive evidence in the case, and that the practice would open the door to collusion.¹ On the other hand, it was urged in favor of the admission of such evidence that there could be no imputation of bad faith, if a party, finding himself deceived in his witness, should prove his contradictory statements, and that there would be no other mode of guarding against the fraud of an artful witness who might be secretly aiding the adverse party.² Notwithstanding this difference of opinion, it was held by the decided *weight of authority in England* that, even when a party was surprised by the adverse testimony of his witness, he could not impeach him by proof of different statements made by him out of court before the trial.³ This question was, however, set at rest in England by a *statute* allowing a party to prove that his own witness had made a statement inconsistent with the present testimony, but this is allowed only in case, in the opinion of the judge, such *witness proves* to be *adverse*, and only after laying the foundation for impeachment as in other cases.⁴

1, Bull. N. P. 297; 2 Phill. Ev. (10th ed.) 525. On this general subject, see notes, 60 Am. Dec. 749-752; 21

L. R. A. 418-433, where the whole subject is discussed at length, and the law of each state given. See also, articles, 22 Am. L. Rev. 455; 20 Weekly L. Bull. 1; 1 Univ. L. Rev. 80.

2, Opinion of Bolland B. in Wright v. Beckett, 1 Moody & Rob. 414.

3, Opinion of Lord Denman in Wright v. Beckett, 1 Moody & Rob. 414; Dunn v. Aslett, 2 Moody & Rob. 122.

4, Reg. v. Ball, 8 Car. & P. 745; Melhuish v. Collier, 15 Q. B. 878; Holdsworth v. Mayor, 2 Moody & Rob. 153.

5, 17 & 18 Vict. ch. 125; 28 & 29 Vict. ch. 18; Steph. Ev. art. 130. See the statutes of this country cited in sec. 859 *infra*.

§ 858. **Same, continued.**—Although the conflict of opinion on this question, which arose in England, has continued in the American courts, it is the rule supported by the great weight of authority that, in the absence of statutes, a *party cannot be allowed to offer direct proof by other witnesses, either of the bad character of his own witness for truth and veracity, or that he has previously made statements inconsistent with his present testimony.*¹ This rule has been so applied that, when one party calls a *witness of the adverse party* to prove certain facts, he is thereby prevented from impeaching such witness.² So the rule has been applied even *where a litigant calls the adverse party as his own witness* to prove matters, not merely formal, or where he is not compelled by law to call him.³ But this rule has been changed by statute in some states.⁴ It is otherwise, how-

ever, if the party in such cases becomes a witness in his own behalf or testifies as to new matters, not responsive to the questions asked him.⁵ As will be seen hereafter, it is admissible in some states, under certain conditions, to allow a party to show the contrary declarations of his own witness.⁶ Although the weight of authority sustains the view that a party cannot prove the contradictory statements of his own witness to discredit him, yet *the party is not wholly without remedy, if surprised or deceived* by the testimony. In such a case, he may interrogate the witness in respect to previous statements inconsistent with the present testimony, for the purpose of probing his recollection. He may, in this way, show the witness that he is mistaken, and give him an opportunity to explain the apparent inconsistency. This is also proper to show the circumstances which induced the party to call the witness.⁷ But where the sole effect of answers to such questions would be to discredit the witness, the questions should be excluded;⁸ and, if the recollection of the witness is not refreshed after such questions, the party *cannot prove his contradictory statements by other witnesses.*⁹

1. People v. Safford, 5 Den. 112; Hall v. Chicago, R. I. & P. Ry. Co., 84 Iowa 311; Adams v. Wheeler, 97 Mass. 67; Dixon v. State, 86 Ga. 754; Smith v. Price, 8 Watts (Pa.) 447; People v. Jacobs, 49 Cal. 384; Coulter v. Amer. Exp. Co., 56 N. Y. 585; Stearns v. Merchants' Bank, 53 Pa. St. 490; Langford v. Jones, 18 Ore. 307; Moore v. Chicago Ry.

Co., 59 Miss. 243; *Brewer v. Porch*, 17 N. J. L. 377; *Cox v. Eayres*, 55 Vt. 24; 45 Am. Rep. 583; *Pollock v. Pollock*, 71 N. Y. 137; *Craig v. Grant*, 6 Mich. 447; *Thorn v. Moore*, 21 Iowa 285; *People v. Mitchell*, 94 Cal. 550; *Ellicott v. Pearl*, 10 Peters 412; *Adams v. Wheeler*, 97 Mass. 67; *Richards v. State*, 82 Wis. 172; *State v. Keefe*, 54 Kan. 197; *Hickory v. United States*, 151 U. S. 303. This rule has been vigorously criticised, see article, 11 Am. L. Rev. 261; also note, 50 Am. Dec. 749, where the rule is discussed. See also, *Selover v. Bryant*, 54 Minn. 434, and cases cited; *State v. Sorter*, 52 Kan. 531. As to the statutes modifying the rule, see the next section.

2, *Craig v. Grant*, 6 Mich. 447; *Richards v. State*, 82 Wis. 172; *Fairchild v. Bascom*, 35 Vt. 398; *First Baptist Church v. Brooklyn Ins. Co.*, 23 How. Pr. (N. Y.) 448; *Com. v. Hudson*, 11 Gray 64. But see, *Jones v. People*, 2 Col. 351. See note, 21 L. R. A. 418.

3, *Claffin v. Dodson*, 110 Mo. 212; *Tarsney v. Turner*, 48 Fed. Rep. 818; *Branch v. Levy*, 46 N. Y. S. 428; *Helms v. Green*, 105 N. C. 251; 18 Am. St. Rep. 893, where the deposition of the adverse party was taken under a statute. See also, *Pickard v. Bryant*, 92 Mich. 430; *Dravo v. Fabel*, 132 U. S. 487. See note, 21 L. R. A. 425.

4, Maryland, Rev. Stat. art. 70 sec. 4; Mississippi, Code sec. 1762; New Hampshire, Pub. Stat. ch. 224 sec. 15; North Carolina, Code sec. 583.

5, *Hester v. Wallace*, 6 Bush (Ky.) 182; *Dravo v. Fabel*, 25 Fed. Rep. 116; 132 U. S. 487.

6, See next section.

7, *Bullard v. Pearsall*, 53 N. Y. 230; *McDaniel v. State*, 53 Ga. 253; *Griffith v. State*, 90 Ala. 583; *Hemingway v. Garth*, 51 Ala. 530; *Melhuish v. Collier*, 15 Q. B. 878; *Hildreth v. Aldrich*, 15 K. L. 163; *National Syrup Co. v. Carlson*, 42 Ill. App. 178; *George v. Triplett*, (N. Dak.) 63 N. W. Rep. 891; *Hurley v. State*, 46 Ohio St. 320; *Humble v. Shoemaker*, 70 Iowa 223; *Schuster v. State*, 80 Wis. 107; *McNerney v. City of Reading*, 150 Pa. St. 711; *Greenl. Ev. sec. 444* and note.

8, *Bullard v. Pearsall*, 53 N. Y. 230.

9, *Hildreth v. Aldrich*, 15 R. I. 163; *Hurley v. State*, 46 Ohio St. 320. See cases cited in note 1 *supra*.

§ 859. Exceptions and qualifications of the rule.—An exception to the general rule, which is sanctioned by very high authority, is "where the witness is not one of the party's own selection, but is one whom the law obliges him to call, such as a *subscribing witness to a deed or a will*, or the like; here he can hardly be considered as the witness of the party calling him, and therefore, as it seems, his character for truth may generally be impeached."¹ Although the language used by Mr. Greenleaf as just quoted is quite general, it is doubtful whether the authorities admit of the reception of such testimony, except to prove the former contradictory statements of the witness. According to the weight of judicial opinion, it would seem that testimony, showing the reputation of the witness for truth and veracity to be bad, should be excluded.² *In some states, the general rule that a party cannot impeach his own witness has been so modified by statute as to allow a party to show statements of his own witness inconsistent with his present testimony, especially when he is surprised by such testimony, but it is usually provided that he must first ask the witness as to such statements and allow him an opportunity to explain them. In some instances, this is on condition that, in the opinion of*

the judge, the witness is shown to be *adverse*.³ Under such a statute, it was held in Massachusetts that such testimony could be received, although the party was not surprised or deceived by the testimony of his witness.⁴ But, in other states where the statutes are different, another rule prevails.⁵ Under these statutes, the right of a party to impeach his own witness arises only when the witness testifies to some matter *prejudicial* to the party calling him. Nor do the statutes apply to a case where the witness fails to testify to such facts as he is called to prove.⁶ *Written instruments* are not witnesses within the general rule under discussion. Hence, a party may offer in evidence a bill of sale or other instrument in writing, if it forms a part of the transaction in issue, and afterwards show that the instrument had its inception in fraud.⁷

1, Greenl. Ev. sec. 443; Shorey v. Hussey, 32 Me. 579; Olinde v. Saizan, 10 La. An. 153; Williams v. Walker, 2 Rich. Eq. (S. C.) 291; 46 Am. Dec. 53; Whitman v. Morey, 63 N. H. 448; Harden v. Hays, 9 Pa. St. 151; Diffenderfer v. Scott, 5 Ind. App. 243; Brown v. Bellows, 4 Pick. 179; Hildreth v. Aldrich, 15 R. I. 163; Thornton v. Thornton, 39 Vt. 122, where a witness to a will had testified that the testator was insane, and his contradictory statements were admitted.

2, Whitaker v. Salisbury, 15 Pick. 534; Dennett v. Dow, 17 Me. 19; Harden v. Hays, 9 Pa. St. 151. Contra, Williams v. Walker, 2 Rich. Eq. (S. C.) 291. In a few states, proof of general bad character is allowed by statutes, where it is indispensable for the party to produce a witness, Arkan-

sas, Dig. Stat. 1894 sec. 2958; Indiana, Rev. Stat. 1896 sec. 507; Kentucky, Code 1895 sec. 596.

3, *Com. v. Donahoe*, 133 Mass. 407; *Ryerson v. Abington*, 102 Mass. 526; *Newell v. Homer*, 120 Mass. 277; *Blackburn v. Com.*, 12 Bush (Ky.) 181; *Hemingway v. Garth*, 51 Ala. 530; *Conway v. State*, 118 Ind. 482; *White v. State*, 10 Tex. App. 381; *Cowen v. Reynolds*, 12 Serg. & R. (Pa.) 281; Arkansas, Dig. Stat. 1894 sec. 2960; California, Code secs. 2049-2052; Florida, Rev. Stat. sec. 1101; Georgia, Code sec. 3869; Idaho, Rev. Stat. sec. 6080; Indiana, Rev. Stat. sec. 507; Kentucky, Civil Code sec. 660; Massachusetts, Pub. Stat. 1882 ch. 169 sec. 22; New Hampshire, Rev Stat. 1891 ch. 224 sec. 15; New Mexico, Comp. Laws sec. 2087; Oregon, Civil Code sec. 838; Texas, Code Crim. Proc. art. 755. See notes, 74 Am. Dec. 398; 15 Am. Dec. 96; 21 L. R. A. 424.

4, *Brooks v. Weeks*, 121 Mass. 433.

5, *Dixon v. State*, 86 Ga. 754; *Miller v. Cook*, 124 Ind. 101.

6, *Hull v. State*, 93 Ind. 128, 133; *Chism v. State*, 70 Miss. 742; *Blough v. Parry*, (Ind.) 40 N. E. Rep. 70; *Erwin v. State*, 32 Tex. Cr. Rep. 519; *People v. Jacobs*, 49 Cal. 384; *Adams v. Wheeler*, 97 Mass. 67; *People v. Mitchell*, 94 Cal. 550; *Champ v. Com.*, 2 Met. (Ky.) 17.

7, *Henny Buggy Co. v. Patt*, 73 Iowa 485.

§ 860. Party not bound to accept testimony of his own witness as correct. The general rule that one cannot impeach his own witness must not be understood to imply that the party is bound to accept such testimony as correct. On the contrary, it is very clear that the one producing a witness may prove the truth of material facts by any other competent evidence, even though the effect of such testimony is to directly con-

tradict his own witness.¹ Thus in an action on warranty by defendant's servant, where the servant was called by the plaintiff as a witness and testified that he had given no warranty, the plaintiff was allowed to prove, by other witnesses, that the servant had in fact given such warranty.² So where the defendant called the plaintiff as to the ownership of the note sued on, the defendant was allowed to disprove, by other witnesses, the testimony thus given.³ A party may offer the books of his witness in evidence, although they contradict the testimony of such witness.⁴ A party is not bound by all the statements of a witness called by him, if adverse, even *though no other witnesses are called to contradict him*; the party may rely on part of such testimony, although in other parts the witness denies the facts sought to be proved.⁵ It has been well said that, if the other rule should prevail, "every one would be at the mercy of his own witnesses, and if the first witness sworn should swear against him, he would lose the testimony of all the rest. This would be a perversion of justice."⁶

1, Hickory v. United States, 151 U. S. 303; Norwood v. Kenfield, 30 Cal. 393; Smith v. Ehanert, 43 Wis. 181; Meyer Drug Co. v. McMahon, 50 Mo. App. 18; Pollock v. Pollock, 71 N. Y. 137; Tourtelotte v. Brown, 4 Col. App. 377; Adams v. Wheeler, 97 Mass. 67; Crocker v. Agenbroad, 122 Ind. 585; Stearns v. Merchants Bank, 53 Pa. St. 490; Rockwood v. Poundstone, 38 Ill. 199; Thomas v. McDaniel, 88 Iowa 374; McDaniel v. State, 53 Ga. 253; Warren v.

Gabriel, 51 Ala. 235; Schmidt v. Durnham, 50 Minn. 96; Sewell v. Gardner, 48 Md. 178; State v. Taylor, 88 N. C. 694; Chester v. Wilhelm, 111 N. C. 314; Cronan v. Roberts, 65 Ga. 678; Wallach v. Wylie, 28 Kan. 138; Brown v. Osgood, 25 Me. 505; Oimstead v. Winsted Bank, 32 Conn. 278; 85 Am. Dec. 260; Brown v. Wood, 19 Mo. 475; Swamscot Machine Co. v. Walker, 22 N. H. 457; 55 Am. Dec. 172; Skillinger v. Howell, 8 N. J. L. 310; Fairly v. Fairly, 38 Miss. 280; Paxton v. Boyce, 1 Tex. 317; DeMeli v. DeMeli, 120 N. Y. 485; 17 Am. St. Rep. 652, where the defendant had been called by the plaintiff to testify as to his place of residence; Webber v. Jackson, 79 Mich. 175; 19 Am. St. Rep. 165, as to a question of fraud; Gardner v. Connelly, 75 Iowa 205; State v. Cummins, 76 Iowa 133; United States v. Hall, 44 Fed. Rep. 864. See note, 21 L. R. A. 424.

2, Alexander v. Gibson, 2 Camp. 555.

3, Gardner v. Connelly, 75 Iowa 205.

4, Groschke v. Bardenheimer, 15 Mo. App. 353.

5, Becker v. Koch, 104 N. Y. 394; 58 Am. Rep. 515.

6, Snell v. Gregory, 37 Mich. 500.

§ 861. **Same, continued.**—The rule under discussion applies with peculiar force where a party calls his *adversary as witness*.¹ It often happens that a litigant is compelled to call the adverse party to prove particular facts; and it would be an intolerable rule, if testimony given under such circumstances could not be controverted.² The general rule is the same, *although the effect of such testimony is to incidentally discredit the former witness and to tend to show that he is unworthy of belief*.³ It is immaterial whether the testimony thus adduced shows that the

witness was mistaken or whether it shows that he has willfully perverted the facts.⁴ The object of the inquiry is not to discredit the witness, but to prove the facts relevant to the controversy; and this should be permitted whatever the incidental result may be upon the credit of any witness.⁵ Where a party thus calls witnesses who give testimony contrary to or inconsistent with that of a former witness, the *testimony* of the latter is *not necessarily to be wholly repudiated*. All the testimony is submitted to the jury for their consideration.⁶ So when a party proves, by other testimony, facts in conflict with the testimony of one of his own witnesses, it is error to charge the jury that, when a party calls a witness, he vouches for him and can not deny that he is unworthy of belief.⁷ It is error to instruct the jury that impeaching testimony as to the contradictory statements of a witness is "generally worthless to destroy the evidence of witnesses to facts."⁸ Before closing this subject, attention should be called to the *effect of impeaching testimony* consisting of the contradictory or inconsistent statements of witnesses. It often happens that such testimony is of vital importance in its effect upon the credit of the witness; and it is not infrequent that jurors fail to understand that such testimony is only received to affect the credibility of witnesses. In other words, the *impeaching testimony does not es-*

tablish or in any way *tend to establish the truth of the matters contained in the contradictory statements.*⁹

1, DeMeli v. DeMeli, 120 N. Y. 485; 17 Am. St. Rep. 652; Arms v. Arms, 113 N. Y. 646; Webber v. Jackson, 79 Mich. 175; 19 Am. St. Rep. 165; Schmidt v. Durnham, 50 Minn. 96. See note, 21 L. R. A. 425.

2, DeMeli v. DeMeli, 120 N. Y. 485; 17 Am. St. Rep. 652; Arms v. Arms, 113 N. Y. 646; Webber v. Jackson, 79 Mich. 175; 19 Am. St. Rep. 165. This is especially true where the testimony relates to motives or intent, McLean v. Clark, 31 Fed. Rep. 501.

3, Stockton v. Demuth, 7 Watts (Pa.) 39; 32 Am. Dec. 735; Thom v. Moore, 21 Iowa 285; Smith v. Ehanert, 43 Wis. 181; Warren v. Gabriel, 51 Ala. 235; Brown v. Bel-lows, 4 Pick. 179. See also cases next cited.

4, Skipper v. State, 59 Ga. 63; Warren v. Gabriel, 51 Ala. 235; Pollock v. Pollock, 71 N. Y. 137; Hunter v. Wet-sell, 84 N. Y. 549; Hall v. Houghton, 37 Me. 411; Rich-ards v. State, 82 Wis. 172; Norwood v. Kenfield, 30 Cal. 393; Olmstead v. Winsted Bank, 32 Conn. 278; 85 Am. Dec. 260. See also, Pickard v. Bryant, 92 Mich. 430. See note, 60 Am. Dec. 749.

5, Sewell v. Gardner, 48 Md. 178. As where it shows the witness to be wholly unworthy of credit, McFarland v. Ford, 32 Ill. App. 173.

6, Bradley v. Ricardo, 8 Bing. 57; Hall v. Houghton, 37 Me. 411; Brennan v. People, 15 Ill. 511; Henry v. Sioux City Ry. Co., 75 Iowa 84; 9 Am. St. Rep. 457.

7, McFarland v. Ford, 32 Ill. App. 173.

8, Warder v. Fisher, 48 Wis. 338.

9, Law v. Fairfield, 46 Vt. 425; Jensen v. Michigan Cent. Ry. Co., 102 Mich. 176; Sellers v. Jenkins, 97 Ind. 430; Davis v. Hardy, 76 Ind. 272; Hicks v. Stone, 13 Minn. 434.

1862. Reputation for veracity—Mode of impeachment.—It has long been the

settled rule that it is relevant in any action to show that the character or reputation of any material witness for truth and veracity is bad. The words "*character*" and "*reputation*" are often used in this connection as interchangeable. Such use is thus explained by Mr. Justice Strong: "It is true that, in many cases, it has been said, the regular mode of examining is to inquire whether the witness knows the general character of the person whom it is intended to impeach, but, in all such cases, the word character is used, as synonymous with reputation. What is wanted is the common opinion, that in which there is general concurrence, in other words, general reputation or character attributed. That is presumed to be indicative of actual character, and hence it is regarded as of importance when the credibility of a witness is in question."¹ This mode of impeachment is a direct attack upon the credibility of a witness. It is necessary to first show that the impeaching witness knows the general character of the person to be impeached or his reputation for truth and veracity in the community where he resides.² It is *not a condition* to the competency of the impeaching witness *that he should reside in the same neighborhood*;³ and, if the witness has changed his domicile, his reputation at both places may be shown within reasonable limits of time.⁴ Nor is the evidence confined to the

*reputation of the witness at the time of the trial.*⁶ Thus, where the witness had removed from a community some years before the trial, the impeaching testimony of his former neighbors may be received.⁶ Since the reputation of a witness is usually the result of a course of life or conduct extending through a considerable time, the *range of inquiry* must, to some extent, rest in the *discretion of the trial judge*.⁷ But if the inquiry relates to a time or place so remote as to afford no reasonable ground of information as to the present character or reputation of the witness, the questions should be excluded.⁸ While impeaching evidence may be given of the reputation of the witness just before the commencement of the pending suit, the weight of the testimony is lessened, if the damaging reports grew out of the subject matter of the suit. Witnesses have been held competent to testify on the subject who had no knowledge of the character of the witness sought to be impeached, until the controversy arose.⁹ But a *mere stranger*, who goes into the neighborhood only for the purpose of ascertaining the reputation of the witness, is not competent to testify on the subject.¹⁰ Contrary to the general weight of authority, the view has been expressed in a few cases that there is no question of competency for the court to settle in regard to the knowledge of witnesses called to testify to the point of reputation for truth and ver-

acity; that all witnesses, competent to testify to any other fact in the case, are competent to testify to the fact of reputation for truth, and that the inquiry as to amount and means of knowledge of the witness is for the jury."

1, *Knobe v. Williamson*, 17 Wall. 588. See also, *State v. Egan*, 59 Iowa 636. As to the general subject of impeachment by attacking character or reputation, see articles, 30 Cent. L. Jour. 241; 32 Am. L. Reg. 229; 36 Cent. L. Jour. 514; 65 L. Times 61; 11 L. Quart. Rev. 20.

2, *Teese v. Huntingdon*, 23 How. 2; *Bogle v. Kreitzer*, 46 Pa. St. 465; *Stokes v. State*, 18 Ga. 17; *Henderson v. Hayne*, 2 Met. (Ky.) 342; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Coates v. Sulau*, 46 Kan. 341; *Sorrelle v. Craig*, 9 Ala. 534; *Kelley v. Proctor*, 41 N. H. 139; *State v. Parks*, 3 Ired. (N. C.) 296; *State v. Johnson*, 41 La. An. 574; *Crabtree v. Hagenbaugh*, 25 Ill. 233; 79 Am. Dec. 324; *People v. Rector*, 19 Wend. 569; *Chess v. Chess*, 1 Pen. & W. (Pa.) 32; 21 Am. Dec. 350; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Holbert v. State*, 9 Tex. App. 219; 35 Am. Rep. 738; *State v. Meadows*, 18 W. Va. 658; *Wilson v. State*, 3 Wis. 798; *Winter v. Central Iowa Ry Co.*, 80 Iowa 443. When the witness shows no knowledge of such a character, he should not be further questioned on the subject, *Com. v. Lawler*, 12 Allen 585.

3, *Wallis v. White*, 58 Wis. 26; *Hadjo v. Gooden*, 13 Ala. 718, where the impeaching witness lived twelve miles away; *Dupree v. State*, 33 Ala. 380; 73 Am. Dec. 422, where the two persons lived twenty miles apart.

4, *Hamilton v. People*, 29 Mich. 173; *Sage v. State*, 127 Ind. 15; *Coates v. Sulau*, 46 Kan. 341.

5, *Sleeper v. Van Middlesworth*, 4 Den. 431, four years; *People v. Abbot*, 19 Wend. 192; *Amidon v. Hosley*, 54 Vt. 25, just before the trial; *Dollner v. Lintz*, 84 N. Y. 669, eighteen months before; *Com. v. Billings*, 97 Mass. 405, reputation of a witness eighteen months before the trial; *Keator v. People*, 32 Mich. 484, for four years, where the witness had no fixed domicil; *Snow v. Grace*, 29 Ark. 131,

seven years; *Pape v. Wright*, 116 Ind. 502, sixty days before the trial; *Thurmond v. State*, 27 Tex. App. 347; *Watkins v. State*, 82 Ga. 231; 14 Am. St. Rep. 155, eight years. See also, *Sun Fire Office of London v. Ayerst*, 37 Neb. 184.

6, *Sleeper v. Van Middlesworth*, 4 Den. 431; *Rathburn v. Ross*, 46 Barb. (N. Y.) 127; *Coates v. Sulau*, 46 Kan. 341. But the testimony of one who had known the reputation of the witness years before in Ireland has been rejected, *Webber v. Hanke*, 4 Mich. 198. So it has been rejected as to former reputation, where the witness had lived five years in a place and was well known there, *State v. Potts*, 78 Iowa 656. But the contrary rule has been held, and evidence as to character eight years before admitted, *Watkins v. State*, 82 Ga. 231; 14 Am. St. Rep. 155. In *Sage v. State*, 127 Ind. 15, evidence as to reputation in a community was not received where the witness had been absent seven years by reason of imprisonment.

7, *Dollner v. Lintz*, 84 N. Y. 669; *Stratton v. State*, 45 Ind. 468; *Cline v. State*, 51 Ark. 140; *State v. Turner*, 36 S. C. 534; *State v. Spencer*, 45 La. An. 1.

8, *Rucker v. Beaty*, 3 Ind. 70; *Webber v. Hanke*, 4 Mich. 198; *Aurora v. Cobb*, 21 Ind. 492; *State v. Howard*, 9 N. H. 485. Reputation in a place where the residence had ceased two and a half years before was held too remote in *Sun Fire Office v. Ayerst*, 37 Neb. 184.

9, *Mask v. State*, 36 Miss. 77; *State v. Turner*, 36 S. C. 534, where the witness did not know the individual personally.

10, *Reid v. Reid*, 17 N. J. Eq. 101; *Curtis v. Fay*, 37 Barb. (N. Y.) 64; *Haley v. State*, 63 Ala. 83.

11, *Bates v. Barber*, 4 Cush. 107. See also, *Wetherby v. Norris*, 103 Mass. 565, where such inquiry was held discretionary.

§ 863. Only general reputation for truth and veracity admissible.—Where a witness is thus called to impeach character,

he can only speak of the general reputation for truth and veracity of the person sought to be impeached.¹ The question *does not call for the individual opinion* or feeling of the witness upon the subject, but for his knowledge, for the general speech of people concerning the other witness and the common repute which he bears among those who know him, since this is the only mode in which his reputation can be ascertained.² Hence it would not be sufficient foundation, if the witness should only know the repute in which the other witness is held by two or three neighbors;³ nor to merely show that the witness had had business relations with such person;⁴ nor ought the question to be limited to the reputation of the witness among those "who deal and associate with him."⁵ But it is not necessary, in order to lay the foundation, to show that the impeaching witness knows the reputation sustained by the other witness among "a majority of the neighbors."⁶ Under this rule, inquiry cannot be made of the impeaching witness as to *particular facts* which tend to discredit the reputation of the person sought to be impeached;⁷ for example, such proof cannot be given as to his habits of intemperance,⁸ or that he is a notorious counterfeiter,⁹ or that he is esteemed a horse thief,¹⁰ or that, in a former case, he gave testimony which was not believed by the jury,¹¹ or that he had been habitually a witness in a given

class of cases,¹² or that he is an habitual litigant,¹³ or that a witness is dangerous, when intoxicated,¹⁴ or as to the chastity of the witness, unless chastity is in issue,¹⁵ or as to alleged frauds committed by the witness.¹⁶

1, *Bucklin v. State*, 20 Ohio 18; *Kennedy v. Upshaw*, 66 Tex. 442. But the testimony is not rendered inadmissible by the omission of the word "general," if the evidence shows that it is based on general reputation, *Coates v. Sulau*, 46 Kan. 341. If the witness is well known in the city, the inquiry should not be confined to the locality of his dwelling place, *People v. Lyons*, 51 Mich. 215.

2, *Ayres v. Duprey*, 27 Tex. 593; *Kimmel v. Kimmel*, 3 Serg. & R. (Pa.) 336; 8 Am. Dec. 655; *Crabtree v. Kile*, 21 Ill. 180; *Bucklin v. State*, 20 Ohio 18; *French v. Millard*, 2 Ohio St. 44; *Com. v. Lawler*, 12 Allen 585; *Benesch v. Wagner*, 12 Col. 534; 13 Am. St. Rep. 254; *Teese v. Huntington*, 23 How. 2; *Dave v. State*, 22 Ala. 23; *People v. Webster*, 89 Cal. 575. It is not sufficient as a basis for the witness to say: "I have heard others say;" it should be the general report, *Wike v. Lightner*, 11 Serg. & R. (Pa.) 198.

3, *Matthewson v. Burr*, 6 Neb. 312; *Com. v. Rogers*, 136 Mass. 158; *Pickens v. State*, 61 Miss. 563.

4, *Healy v. Terry*, 9 N. Y. S. 519; *Sargent v. Wilson*, 59 N. H. 396.

5, *Dance v. McBride*, 43 Iowa 624.

6, *Dave v. State*, 22 Ala. 23; *Robinson v. State*, 16 Fla. 835.

7, *Johnson v. State*, 61 Ga. 305; *Dimick v. Downs*, 82 Ill. 570; *Meyncke v. State*, 68 Ind. 401; *Conley v. Meeker*, 85 N. Y. 618; *Bucklin v. State*, 20 Ohio 18; *Johnson v. Brown*, 51 Tex. 65; *Thurman v. Virgin*, 18 B. Mon. (Ky.) 785; *Barton v. Morpheus*, 2 Dev. (N. C.) 520; *Wike v. Lightner*, 11 Serg. & R. (Pa.) 198; *Sharon v. Sharon*, 79 Cal. 633; *State v. Barrett*, 40 Minn. 65; *State v. Jackson*, 44 Ia. An. 160.

8, *Hoitt v. Moulton*, 21 N. H. 586; *Thayer v. Boyle*, 30 Me. 475; *State v. Nelson*, 101 Mo. 464; *People v. Kahler*, 93 Mich. 625.

9, *Crane v. Thayer*, 18 Vt. 162; 46 Am. Dec. 142.

10, *State v. Sater*, 8 Iowa 420.

11, *Schenck v. Griffin*, 38 N. J. L. 462.

12, *Rebecca Lea v. State*, 64 Miss. 294.

13, *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261.

14, *State v. Nelson*, 101 Mo. 464.

15, *Com. v. Moore*, 3 Pick. 194; *Com. v. Churchill*, 11 Met. 538; 45 Am. Dec. 229; *Jackson v. Lewis*, 13 Johns. 504; *Bakeman v. Rose*, 18 Wend. 146; *Spears v. Forrest*, 15 Vt. 435; *Leverich v. Frank*, 6 Ore. 212; *People v. Vslas*, 27 Cal. 630; *State v. Morse*, 67 Me. 428; *Dimick v. Downs*, 82 Ill. 570; *State v. Clawson*, 30 Mo. App. 139, especially as to a male witness; *McInerny v. Irvin*, 90 Ala. 275. See also, *Crump v. Com.*, (Ky.) 20 S. W. Rep. 390. As we have seen, in cases of rape and in some other offenses against women, the character of the prosecutrix for chastity may be shown, see sec. 846 *supra*. See also, *Pleasant v. State*, 15 Ark. 624; *McInerny v. Irvin*, 90 Ala. 275; *State v. Rogers*, 108 Mo. 202; *People v. Harrison*, 93 Mich. 594; *People v. Mills*, 94 Mich. 630.

16, *Sarrelle v. Craig*, 9 Ala. 535.

§ 864. **The view that the inquiry may relate to moral character generally.**—The view is sustained by high authority that the inquiry into the general character of the witness should not be restricted to his reputation for truth and veracity, but should be allowed to involve his *entire moral character*. It is urged that it may frequently happen that persons of known infamous character may have established no reputation as to

truthfulness or lack of truth, and that society may have had no opportunity of ascertaining whether their statements are generally true or false. It is further urged that the jury can be safely trusted with a full knowledge of the general moral standing of the witness; that, while they would not reject his testimony on account of minor views, they would be justified in so doing, if general turpitude were shown.¹ The *English rule* is thus stated in quite general terms by Mr. Stephen: "The credit of any witness may be impeached by the adverse party by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not upon their examination-in-chief give reasons for their belief, but they may be asked their reasons in cross-examination; and their answers cannot be contradicted."² Although the tendency of English authorities is to give considerable latitude to this inquiry, and although this view has the support of some American authority, the prevailing rule in this country is, as we have seen, to confine the inquiry to the reputation of the witness for *truth and veracity*.³ After the proper *foundation has been laid* by showing that the witness knows the reputation for truth and veracity of the person in question in the community where he lives, the *next interrogatory* should be, *what that reputation is*.

1, *R. v. Watson*, 13 How. St. Tr. 458; *Carpenter v. Wall*, 11 Adol. & Ell. 803; *Anon.*, 1 Hill (S. C.) 258; *State v. Boswell*, 2 Dev. (N. C.) 209; *Hume v. Scott*, 3 A. K. Marsh. (Ky.) 260; *State v. Hamilton*, 55 Mo. 520; *State v. Breeden*, 58 Mo. 507; *Walton v. State*, 188 Ind. 9; *Davenport v. State*, 85 Ala. 336; *Atwood v. Impson*, 20 N. J. Eq. 150; *State v. Raven*, 115 Mo. 419; *Dollner v. Lintz*, 84 N. Y. 669; *Tayl. Ev. sec. 1471*. In Missouri, this question was held proper: "Do you know the defendant's general character in the neighborhood where he lives for truth and veracity, honesty, chastity and morality?" *State v. Clinton*, 67 Mo. 380; 29 Am. Rep. 506. In a few states, under statutes, evidence may relate to reputation, as to the general moral character, *Morrison v. State*, 76 Ind. 335; *Majors v. State*, 29 Ark. 112; *Cline v. State*, 51 Ark. 140. See notes, 73 Am. Dec. 771; 56 Am. Dec. 219.

2, *Steph. Ev. art. 133*.

3, *Dimick v. Downs*, 82 Ill. 570; *Rudsill v. Slingerland*, 18 Minn. 380; *Sargent v. Wilson*, 59 N. H. 396; *Shaw v. Emery*, 42 Me. 59; *Amidon v. Hosley*, 54 Vt. 25; *Quinsigamond Bank v. Hobbs*, 11 Gray 250; *State v. Randolph*, 24 Conn. 363; *Warner v. Lockerby*, 31 Minn. 421; *Hillis v. Wylie*, 26 Ohio St. 574; *Laclede Bank v. Keeler*, 109 Ill. 385; *Lenox v. Fuller*, 39 Mich. 268; *Kennedy v. Upshaw*, 66 Tex. 442; *Ketchingman v. State*, 6 Wis. 426. In California, the inquiry is as to reputation for truth, honesty and integrity, *People v. Markham*, 64 Cal. 157. See also the cases cited above.

§865. Inquiry as to believing the witness under oath.—It has been the subject of considerable discussion whether the witness may be asked, on stating such reputation to be bad, if, from that reputation, he would believe the person in question under oath. It is urged, as an objection to such inquiry, that the opinion of the witness should not be substituted for that of the jury;

that the admission of such opinions is a departure from the usual rules of evidence, and that it gives an opportunity to bring before the jury the prejudices, feelings and hostility of witnesses.¹ On the other hand, it is urged, in favor of the admission of such testimony, that witnesses frequently misunderstand the nature of impeaching questions, assuming that they relate to character in general rather than to reputation for veracity, and that, when the question of credit is thus directly presented, the witness will better understand the nature of the inquiry and more carefully weigh his answer. It is also urged that the reputation of the witness sought to be impeached is not a mere matter of opinion, but one of fact; that on this subject, as in a large class of other cases, ordinary witnesses may give their conclusions, where their means of knowledge have been stated, and that the jury can best judge of the credibility of the witness who is attacked, when they know the extent to which such credibility has been impaired.² Although, as we have seen, the propriety of such questions has been doubted,³ yet the *great weight of authority sustains the practice*.⁴ In a few states, however, there is some departure from the rule. Thus in one state, it is held that the inquiry can only be, whether the witness is deserving of credit on oath.⁵ In a few other states, the inquiry is not allowed at all.⁶

Although it is *usual to ask the witness whether he would believe the person sought to be impeached under oath, this is not required.*¹

1, Phillips v. Kingfield, 19 Me. 375; 36 Am. Dec. 760.

2, Hamilton v. People, 29 Mich. 173; Watson v. Roode, 30 Neb. 264.

3, Phillips v. Kingfield, 19 Me. 375; 36 Am. Dec. 760; Walton v. State, 88 Ind. 9; Hooper v. Moore, 3 Jones (N. C.) 428; Benesch v. Waggner, 12 Col. 534; 13 Am. St. Rep. 254; Greenl. Ev. sec. 461.

4, R. v. Brown, 10 Cox Cr. C. 453; Stevens v. Irwin, 12 Cal. 306; Eason v. Chapman, 21 Ill. 33; Knight v. House, 29 Md. 194; 96 Am. Dec. 515; Keator v. People, 32 Mich. 484; People v. Rector, 19 Wend. 569; People v. Mather, 4 Wend. 229; 21 Am. Dec. 122; State v. Boswell, 2 Dev. (N. C.) 209; Anon., 1 Hill (S. C.) 258; Ford v. Ford, 7 Humph. (Tenn.) 92; Wilson v. State, 3 Wis. 798; Lyman v. Philadelphia, 56 Pa. St. 488; Hillis v. Wylie, 26 Ohio St. 574; Bullard v. Lambert, 40 Ala. 204; Stokes v. State, 18 Ga. 17; State v. Meadows, 18 W. Va. 658; State v. Christian, 44 La. An. 950; Nelson v. State, 32 Fla. 244; 1 Phill. Ev. 229; 1 Stark. Ev. 182. According to Mr. Stephen, the impeaching witness may state that, from his knowledge of the witness, he believes him unworthy of credit on oath, Steph. Ev. art. 133. It has been held no error to exclude the following question: "From that reputation, would you or not, in a case where he was personally interested, believe him under oath?" This allows the witness to encroach upon the province of the jury in weighing the effect of interest upon credibility, Massey v. Farmers Bank, 104 Ill. 327. Contra, Knight v. House, 29 Md. 194; 96 Am. Dec. 515.

5, Bluit v. State, 12 Tex. App. 39; Holbert v. State, 9 Tex. App. 219; 35 Am. Rep. 738.

6, Walton v. State, 88 Ind. 9; State v. Rush, 77 Me. 519.

7, People v. Mather, 4 Wend. 229; 25 Am. Dec. 221; Laclede Bank v. Keeler, 109 Ill. 385; People v. Tyler, 35 Cal. 553; Mitchell v. State, 94 Ala. 68.

§ 866. **Effect of impeachment.**—Where the general reputation of the witness for truth and veracity is proven to be bad, the jury may properly disregard his evidence except in so far as he is corroborated by other credible testimony;¹ and the court may properly instruct the jury that, if the witness has been successfully impeached either by direct contradiction or by proof of general bad character, his testimony may be disregarded, unless there is such corroboration.² Since it is the province of the jury to judge of the effectiveness of the impeachment and to determine whether any part of the testimony of an impeached witness should be believed, the court may properly refuse to instruct them not to give credit to such testimony.³ The general rules already given apply to all witnesses alike, hence the reputation of an impeaching witness for truth and veracity,⁴ or that of a party to the action may be impeached, as in the case of ordinary witnesses.⁵

1, *Watson v. Roode*, 30 Neb. 264. See secs. 903 *et seq. infra*.

2, *Loehr v. People*, 132 Ill. 504.

3, *People v. O'Brien*, 68 Mich. 468. The whole matter is for the jury, *Spies v. People*, 122 Ill. 1; 3 Am. St. Rep. 320. But it has been held improper to instruct the jury that one who had served out his term for burglary was not entitled to full credit, *People v. McLane*, 60 Cal. 412.

4, *Phillips v. Thorn*, 84 Ind. 84; 43 Am. Rep. 85; *State v. Cherry*, 63 N. C. 493; *Starks v. People*, 5 Den. 106; *State v. Brandt*, 14 Iowa, 180; *State v. Moore*, 25 Iowa 128; 95 Am. Dec. 776; *Long v. Lamkin*, 9 Cush. 361.

5, Foster v. Newbrough, 58 N. Y. 481; Wright v. Hanna, 98 Ind. 217; People v. Beck, 58 Cal. 212.

§ 867. **Cross-examination of impeaching witness.**—There are peculiar reasons for allowing a *searching cross-examination* of the impeaching witness. It may not only be important to test the credibility of the witness, but to ascertain whether he is not testifying concerning his own knowledge or private opinion, and not as to the general reputation of the witness sought to be impeached.¹ As in cross-examination upon other subjects, the extent of the inquiry rests largely in the *discretion of the trial judge*.² It has been urged that, if the witness can be interrogated as to the sources of his information, and as to the statements of others on which he bases his answer, the questions would lead to protracted inquiries and to the betrayal of confidences; but these inconveniences must yield to the necessity for the discovery of the truth.³ Hence the witness may be asked fully as to his *means of knowledge* and the sources of his information upon the subject.⁴ If the witness testifies to the good character of the party, he may be asked if he does not know of *particular acts* inconsistent with such good character.⁵ But it is held that an impeaching witness cannot be asked if he has personal knowledge of any particular act of bad conduct of such person.⁶ He may be

asked to state the names of all persons whom he has heard make statements unfavorable to the reputation of the person in question,¹ and what each person said.² The cross-examiner may ascertain whether the unfavorable reports are general or confined to a few persons,³ and whether the witness knows the meaning of reputation as used in this connection.⁴ It may be shown that the impeaching witness has made statements on the subject, conflicting with his present statements.⁵

1, *Weeks v. Hull*, 19 Conn. 376; 50 Am. Dec. 249; *State v. Miller*, 71 Mo. 89. But the reasons for a witness' view are only to be called out on cross-examination, *Birmingham Union Ry. Co. v. Hale*, 90 Ala. 8. As to the rebuttal of impeaching testimony, see article, 38 Cent. L. Jour. 321.

2, *Arnold v. Nye*, 23 Mich. 286.

3, *Weeks v. Hull*, 19 Conn. 376; 50 Am. Dec. 249.

4, *State v. Howard*, 9 N. H. 485; *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *Weeks v. Hull*, 19 Conn. 376; 50 Am. Dec. 249; *Annis v. People*, 13 Mich. 511; *Phillips v. Kingfield*, 19 Me. 375; 36 Am. Dec. 760; *State v. Reed*, 41 La. Ann. 581; *Montgomery v. Crossthwait*, 90 Ala. 553.

5, *State v. Merriman*, 34 S. C. 16.

6, *Fox v. Com.*, (Ky.) 1 S. W. Rep. 396.

7, *Bates v. Barber*, 4 Cush. 107; *State v. Miller*, 71 Mo. 91; *Lower v. Winters*, 7 Cow. 263; *State v. Perkins*, 66 N. C. 126. If it appears on cross-examination that the bad reports concerning the witness are based on suspicion, the party calling the witness cannot show that the suspicions are without foundation, *State v. Woodworth*, 65 Iowa 141.

8, *Annis v. People*, 13 Mich. 511; *State v. Perkins*, 66 N. C. 126; *Aneals v. People*, 134 Ill. 401, details of an assault held inadmissible.

9, *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; *State v. Meadows*, 18 W. Va. 658; *Phillips v. Kingfield*, 19 Me. 375; 36 Am. Dec. 760.

10, *Bullard v. Lambert*, 40 Ala. 204; *Hutts v. Hutts*, 62 Ind. 214.

11, *State v. Lawlor*, 28 Minn. 216; *Lyles v. Com.*, 88 Va. 396, where it is held that the question of his credibility rests with the jury.

§ 868. Sustaining an impeached witness—Laying foundation.—We have already seen that a person cannot impeach his own witness by proving his bad character for truth and veracity.¹ It is equally clear, as a general rule, that the *party cannot fortify the credit of his witness* by proving good character for truth, *until the credibility of the witness has been assailed*;² nor does evidence disputing the testimony of a witness render competent evidence introduced to sustain his reputation for veracity.³ But, when the reputation of a witness is thus directly attacked by the adverse party, such reputation may be sustained by evidence of other witnesses that it is good, and that they would believe the witness under oath.⁴ Of course, the sustaining witness in such cases must have knowledge of such reputation, and the proper foundation for the testimony must be laid.⁵ But it is *not a necessary condition that he should have heard the reputation of the witness discussed* or called in question, since it is to be presumed that those who are well acquainted

with the witness and his associates would have heard of the fact, if his reputation for veracity was often assailed or called in question. If the testimony were not allowed under such circumstances, "the most respectable man in the community might fail in being supported, if his character for truth should happen to be attacked. Living all his life above suspicion, his truth would rarely be the subject of remark. A neighbor might be obliged to admit, as in this case, that he had never heard it spoken of, and yet be undoubtedly competent to sustain him."⁶ Accordingly the rule has often received judicial sanction that, when a person's character has not been called in question, this fact affords good evidence that his character is good.⁷

1, See secs. 857, 858 *supra*. See note, 11 Am. Dec. 757-760, on corroborative testimony.

2, Brann v. Campbell, 86 Ind. 516; State v. Cooper, 71 Mo. 436; Starks v. People, 5 Den. 106; Wertz v. May, 21 Pa. St. 274; Rogers v. Moore, 10 Conn. 13; Newton v. Jackson, 23 Ala. 335, where a witness was contradicted, but not impeached; Merriam v. Hartford Ry. Co., 20 Conn. 354; 52 Am. Dec. 344, which makes an exception to the general rule in the case of a stranger from another state being a witness. See also, State v. Fruge, 44 La. An. 165. But if such evidence is admitted, it is not reversible error, Green v. State, (Tex.) 12 S. W. Rep. 872.

3, Stevenson v. Gunning's Estate, 64 Vt. 601; Dieffenderfer v. Scott, 5 Ind. App. 243.

4, Hamilton v. People, 29 Mich. 173; Sloan v. Edwards, 61 Md. 89; State v. Nelson, 58 Iowa 208; Com. v. Ingraham, 7 Gray. 46; Morss v. Palmer, 15 Pa. St. 51; Stape v. People, 85 N. Y. 390; Clackner v. State, 33 Ind. 412; Peo-

ple v. Rector, 19 Wend. 569; McCutchen v. McCutchen, 9 Port. (Ala.) 650; Haward v. Galbraith, (Tex.) 30 S. W. Rep. 689; Holly v. State, (Ala.) 17 So. Rep. 102.

5, Clay v. Robinson, 7 W. Va. 348; Cook v. Hunt, 24 Ill. 535. See also, Gifford v. People, 148 Ill. 173.

6, People v. Davis, 21 Wend. 309; Davis v. Franke, 33 Gratt. (Va.) 413; Taylor v. Smith, 16 Ga. 7; State v. Lee, 22 Minn. 407; 21 Am. Rep. 769; Lemons v. State, 4 W. Va. 755; 6 Am. Rep. 293; State v. Nelson, 58 Iowa 208; Bucklin v. State, 20 Ohio 18; Morss v. Palmer, 15 Pa. St. 51; First Nat. Bank v. Wolff, 79 Cal. 69; Hodgkins v. State, 89 Ga. 761. But see, Magee v. People, 139 Ill. 138.

7, See cases last cited.

§ 869. **Same, continued.** — We have seen that the courts should confine the testimony of impeaching witnesses within reasonable limits as to time and place.¹ Although the same principle applies when witnesses are called to sustain reputation, the courts justly allow somewhat more latitude in this respect. If the witness attacked could only prove his good reputation in a single neighborhood or at the time of the trial, serious injustice might be inflicted both upon him and the party for whom he is called by an unjust and unexpected attack.² It is *not necessary* to the admission of sustaining testimony that *the attack by impeachment should have been successful*. It is held "that any inquiries of witnesses by one party as to the general reputation for truth and veracity of a witness, introduced by the other party, are to be considered as an impeachment of the

general character of the witness, so far as to open that subject to the introduction of evidence to sustain his good character."³ The party who voluntarily opens this issue cannot, because he finds that he has been unsuccessful, limit the inquiry to the testimony of his own witnesses.⁴ When a witness has testified to the good character of another, he may be cross-examined as to the existence of reports which may have existed in respect to such person;⁵ and, if he testified to the existence of any such reports from which an unfavorable inference might be drawn, he may be asked on re-examination to state the nature of such reports, in order that the jury may judge whether they are of such a kind as to impair the credibility of the witness.⁶

1, See secs. 862 *et seq. supra*.

2, *Morss v. Palmer*, 15 Pa. St. 51; *Chess v. Chess*, 1 Pen. & W. 32; 21 Am. Dec. 350; *Stratton v. State*, 45 Ind. 468.

3, *Com. v. Ingraham*, 7 Gray 49.

4, *Com. v. Ingraham*, 7 Gray 49.

5, *Stape v. People*, 85 N. Y. 390.

6, *Stape v. People*, 85 N. Y. 390, where it is held that the person calling the witness had the right to ask whether the reports were in respect to his drinking and trading horses.

§ 870. Does a collateral attack admit impeaching testimony. — While it is clear that a direct attack upon the reputation of a witness admits evidence to sustain his cred-

ibility, the question whether such evidence is rendered admissible by a collateral attack is involved in more difficulty. It has sometimes been held that, if it appears from the cross-examination of a witness that he has been guilty of immoral conduct,¹ or charged with a criminal offense,² he may be sustained by evidence of good character for truth. So it was held that, when a witness was assailed by evidence that he had been suborned and paid for his testimony, his good character for veracity might be shown.³ So the same class of testimony has been received in an action on an insurance policy, where the defendant had sought to prove that the plaintiff had burned his building and made false proofs of loss;⁴ and in an action for forgery where the defendant sought to prove that a witness for the state had himself committed the forgery, proof of the good character of such witness was allowed.⁵ In a New York case, which reviews the authorities from that state which are cited above, the conclusion of the court was thus stated: "In general, a party will not be permitted to give evidence of his witness' good character, until it has been attacked on the other side, either by the evidence of witnesses called for such purpose, or by the evidence of the witness on cross-examination, going to impeach his general character."⁶ In this case, it was held that such evidence was not made admissible by the fact

that the witness had stated on cross-examination that he had been prosecuted for perjury. As we have seen, although it is held in some of the cases that answers on cross-examination, which tend to disparage the character of the witness, are sufficient to render admissible sustaining evidence of his good character, and although there is considerable authority in the decisions to support this view, the practice would undoubtedly lead to great confusion and the multiplicity of collateral issues, unless carefully guarded by the discretion of the trial judge.⁷ It is well settled that, *when proof is given, either by cross-examination or other evidence, that the witness has been convicted of a crime, his good reputation for truth, since such conviction, may be shown.*⁸ And such testimony is not received where it appears that the witness was acquitted,⁹ or merely charged with crime without a conviction.¹⁰ So where a witness admitted, on cross-examination, that he had been drunk on various occasions, it was held that this did not render testimony admissible as to his general good character for veracity.¹¹

1, *People v. Rector*, 19 Wend. 569; *Rex. v. Clarke*, 2 Stark. 241. But see, *People v. Gray*, 7 N. Y. 378. See note, 88 Am. Dec. 321.

2, *Carter v. People*, 2 Hill 317; *Central Banking Co. v. Dodd*, 83 Ga. 507.

3, *People v. Ah Fat*, 48 Cal. 61.

4, *Mosely v. Vermont Ins. Co.*, 55 Vt. 142.

5, Webb v. State, 29 Ohio St. 351.

6, People v. Gay, 7 N. Y. 381; Russell v. Coffin, 8 Pick. 143; Rogers v. Moore, 10 Conn. 13; Fulkerson v. Murdock, 53 Mo. App. 151; Diffenderfer v. Scott, 5 Ind. App. 243. See sec. 868 *supra*. A very liberal rule as to what is an attack upon the character of a witness obtains in some states, State v. Cherry, 63 N. C. 493; Paine v. Tilden, 20 Vt. 554; State v. DeWolf, 8 Conn. 93. See the next section.

7, See dissenting opinion of Bronson J. in People v. Gay, 7 N. Y. 378; People v. Rector, 19 Wend. 569; Diffenderfer v. Scott, 5 Ind. App. 243; Hannah v. McKellop, 49 Barb. 342; Braddee v. Brownfield, 9 Watts (Pa.) 124; Schaser v. State, 36 Wis. 429.

8, People v. Webb, 29 Ohio St. 351; Gertz v. Fitchburg Ry. Co., 137 Mass. 77; 50 Am. Rep. 285; R. v. Clarke, 2 Stark. 241; Wick v. Baldwin, 51 Ohio St. 51.

9, Harrington v. Lincoln, 4 Gray 563, 64 Am. Dec. 95.

10, People v. Gay, 7 N. Y. 378; Lipe v. Eisenlerd, 32 N. Y. 229.

11, McCarty v. Leary, 118 Mass. 509.

§ 871. Proof of contradictory statements of witness does not permit evidence of his good character.—It has sometimes been held that, where proof has been offered of the inconsistent or contradictory statements of a witness, his credit may be sustained by proof of his good reputation for truth and veracity; that, since the object of the attack is to impeach the witness, the mode of such attack is immaterial, and that the same reasons exist for sustaining the witness, as where witnesses are called to testify to his bad reputation.¹ But it is *the better view*, and the one sustained

by the weight of authority, *that, in such cases, the witness cannot be fortified by evidence of good character.* Although the contradiction in his statements may tend to show that he ought not to be believed in the particular case, this does not necessarily touch his general good character for truth or integrity, since the inconsistency may be the result of mistake or forgetfulness.² On the same principle, and perhaps for stronger reasons, it is no ground for the introduction of evidence to sustain the character of a witness that other witnesses have contradicted him *by testifying to a different state of facts*, and this remains true, although the contradiction is of such a character as to incidentally impute immorality or crime.³ Nor is such evidence rendered admissible by the fact that the witness has been attacked in the argument of counsel.⁴ In several cases, an exception to the general rule has been recognized. Where the testimony imputes gross fraud to the *subscribing witness of a will*, since deceased, evidence has been received to sustain the character of such witness.⁵ So such testimony was permitted where evidence had tended to show that the testatrix was nearly unconscious at the time her signature was obtained.⁶ In Connecticut, considerable latitude seems to have been allowed in receiving this kind of testimony; for example, the courts of that state have admitted evidence to sustain

the character for veracity of one who was a stranger in the community⁷ and of a deaf and dumb person,⁸ although such character has not been assailed.

1, *Davis v. State*, 38 Md. 15; *George v. Pilcher*, 28 Gratt. (Va.) 299; 26 Am Rep. 350; *Ledbetter v. State*, (Tex. Crim. Rep.) 29 S. W. Rep. 479; *Clark v. Bond*, 29 Ind. 555; *Haley v. State*, 63 Ala. 83; *Isler v. Dewey*, 71 N. C. 14; *Glaze v. Whitley*, 5 Ore. 164; *Burrell v. State*, 18 Tex. 713; *Paine v. Tilden*, 20 Vt. 554; *Board Coms. Carroll Co. v. O'Connor*, 137 Ind. 622.

2, *Gertz v. Fitchburg Ry. Co.*, 137 Mass. 77; 50 Am. Rep. 285; *Saussy v. South Fla. Ry. Co.*, 22 Fla. 327; *Stamper v. Griffin*, 12 Ga. 450; *Brown v. Mooers*, 6 Gray 451; *Vance v. Vance*, 2 Met. (Ky.) 581; *Webb v. State*, 29 Ohio St. 351; *Wertz v. May*, 21 Pa. St. 274; *Chapman v. Cooley*, 12 Rich. (S. C.) 654; *Heywood v. Reed*, 4 Gray 574, where the testimony was rejected, though the contradicting testimony also imputed fraud to the witness; *Hannah v. McKellop*, 49 Barb. 342, same, where it appeared that third persons had accused the witness of false swearing; *People v. Hulse*, 3 Hill 309.

3, *Diffenderfer v. Scott*, 5 Ind. App. 243; *Atwood v. Dearborn*, 1 Allen 483; 79 Am. Dec. 755; *Owens v. White*, 28 Ala. 413; *Chicago & A. Ry. Co. v. Fisher*, 31 Ill. App. 36; *State v. Ward*, 49 Conn. 429; *Brann v. Campbell*, 86 Ind. 516; *Starks v. People*, 5 Den. 106; *Saussy v. South Florida Ry. Co.*, 22 Fla. 327. The same is true where there is a mere attempt to show, by cross-examination, a different state of facts, *Stevenson v. Gunning's Estate*, 64 Vt. 601. But see, *Davis v. State*, 38 Md. 15; *State v. Waggoner*, 39 La. An. 919.

4, *Ricks v. State*, 19 Tex. App. 308; *Brown v. Mooers*, 6 Gray 457. See *Tex. and Pac. Ry. Co. v. Raney*, 86 Tex. 363.

5, *Provis v. Reed*, 3 Moore & P. 4; *Bishop of Durham v. Beaumont*, 1 Camp. 207; *Stephenson v. Walker*, 4 Esp. 50; *Kennedy v. Upshaw*, 66 Tex. 442.

6, *Stephenson v. Walker*, 4 Esp. 50.

7, *Merriam v. Hartford Ry. Co.*, 20 Conn. 354; 52 Am. Dec. 344; *Crook v. State*, 27 Tex. App. 198.

8, *State v. DeWolf*, 8 Conn. 93; 20 Am. Dec. 90, attempt to ravish.

§ 872. Former statements of witness not admissible to corroborate him.—The rule has sometimes been declared that, after an attempt has been made to impeach a witness by showing his contradictory statements, proof may be received that he had affirmed the same thing before on another occasion, and that he is still consistent with himself.¹ But it is clear that this view is contrary to the great weight of authority. A representation without oath can scarcely be considered as any confirmation of a statement upon oath.² If a witness is discredited by proof of contradictory statements at different times, it is no restoration of his credit to show that, at still other times, he has made statements in accordance with his testimony. In some cases, the distinction has been suggested that, while such previous consistent *declarations* could not be received, if *made after* the inconsistent or *contradictory statements*, they might be received, if *prior* in point of time.³ But it is doubtful whether the distinction is well founded; and it seems clear that since, the confirmation of the testimony of a witness by his own

outside statements is contrary to the general rules of evidence, the recognized exceptions should not be too widely extended.⁴ On the same principle, such a witness cannot be corroborated by proof that, on a former occasion, he has made a *sworn statement similar to his present testimony*.⁵

1, Cooke v. Curtis, 6 Har. & J. (Md.) 93; People v. Vance, 12 Wend. 79, where it appeared from the cross-examination of the witness that he was an accomplice; State v. Hendricks, 32 Kan. 559, where the statement was received on the ground that it was *immediately* after the occurrence, and before there was any opportunity or ground for fabrication; Mallonee v. Duff, 72 Md. 283, where the declarations of a witness, made to a third person, were admitted to corroborate his testimony; State v. Jacobs, 107 N. C. 873; State v. Morton, 107 N. C. 890; Glass v. Bennett, 89 Tenn. 478; Hobbs v. State, 133 Ind. 404, citing other Indiana cases; State v. Whelehon, 102 Mo. 17; Gilb. Ev. 135. But see, Robb v. Hackley, 23 Wend. 50.

2, State v. Archer, 73 Iowa 320; Bailey v. State, 9 Tex. App. 98; Tussell v. State, 93 Ga. 450; Munson v. Hastings, 12 Vt. 346; 36 Am. Dec. 345; Smith v. Morgan, 38 Me. 468; Riney v. Vanlandingham, 9 Mo. 807; Nichols v. Stewart, 20 Ala. 358; Mason v. Vestol, 88 Cal. 396; Stolp v. Blair, 68 Ill. 541; People v. Doyell, 48 Cal. 85; State v. Thomas, 3 Strob. (S. C.) 269; Logansport Turnpike Co. v. Heil, 118 Ind. 135; Connor v. People, 18 Col. 373; McAleer v. Horsley, 35 Md. 439; Loomis v. New York, N. H. & H. Ry. Co., 159 Mass. 39.

3, Conrad v. Griffy, 11 How. 480, and cases cited.

4, See sec. 873 *intra*.

5, Robertson v. Caw, 3 Barb. 410; Smith v. State, 103 Ala. 40.

873. Same — Qualification of the rule.

It is hardly necessary to add that, when no

attempt at impeachment has been made, the former statements of the witness cannot be received to corroborate or sustain his statements on the witness stand.¹ Although it is a very general rule that evidence of what the witness has said out of court cannot be received to fortify his testimony, there is another exception which has long been recognized. Where the counsel on the other side imputes to the witness a design to misrepresent from some motive of interest or relationship, in order to repel such imputation, it may be shown that the witness made a similar statement where the supposed motive did not exist, or when the motives of interest would have prompted him to make a different statement of the facts.² On the same principle, the admission of such testimony has been approved in contradiction of evidence tending to show that the account was a fabrication of late date, and where consequently it became material to show that the same account had been given before its ultimate effect and operation, arising from a change of circumstances, could be foreseen.³ It is, of course, no violation of the general rule to allow explanation of facts which may tend to discredit the testimony of a witness;⁴ nor does the rule prevent such testimony as may show the opportunity of knowledge by the witness as to the matters stated by him.⁵

1, *Munson v. Hastings*, 12 Vt. 346; 36 Am. Dec. 345, *Logansport Co. v. Heil*, 118 Ind. 135. See also cases in note 2 of the last section.

2, *Robb v. Hackley*, 23 Wend. 50; *Reed v. Spaulding*, 42 N. H. 114; 1 Phill. Ev. 307, 308.

3, *Robb v. Hackley*, 23 Wend. 50; *English v. State*, (Tex.) 30 S. W. Rep. 233; *Stolp v. Blair*, 68 Ill. 541; *State v. Petty*, 21 Kan. 54; *Hester v. Com.*, 85 Pa. St. 139; *Ellicott v. Pearl*, 10 Peters 412; *State v. Flint*, 60 Vt. 304; 1 Stark. Ev. 149; 2 Poth. Ob. (Evans ed. 1826) 251, 252.

4, *Dole v. Wooldredge*, 142 Mass. 161. See secs. 856 *supra*, 874, 875 *infra*.

5, *People v. Rohl*, 138 N. Y. 616.

1874. Re-examination — Object of.—

After a witness has been cross-examined, the next stage in the proceeding is his re-examination by the party calling him. The object of this examination is to allow the witness to explain or qualify his statements made in the cross-examination, and to give the details of transactions, concerning which he has been cross-examined, but which, during such cross-examination, he had no opportunity to explain. "The counsel has a right, upon such re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further and introduce matter, new in itself, and not suited to the purpose of ex-

plaining either the expressions or the motives of the witness." ¹ When all which constituted the motive and inducement, and which shows the meaning of the words and declarations has been laid before the court, the court becomes possessed of all which can affect the credit of the witness, and all beyond this is irrelevant and incompetent. ²

1, Greenl. Ev. sec. 467; Stark. Ev. 231.

2, The Queen's Case, 2 Brob. & B. 297; 6 E. C. L. 153.

§ 875. Same, illustrations. — To illustrate the rules stated in the last section, if a witness has testified to unfriendly feelings toward a party, he may be asked on the re-direct examination as to the nature and extent of such feeling. ¹ But this does not necessarily admit the reasons for his animosity or the details of the trouble with such party. ² If a witness is asked upon cross-examination when he was first inquired of concerning the facts to which he has testified in chief, he may be asked whether he had previously communicated the same facts to other persons, ³ or as to the truth of a written statement of such facts which was signed by the witness. ⁴ If it appears from the cross-examination of a witness that, at the time of certain transactions, she was leading an abandoned life, it is competent to show, on re-examination, that she is leading a respectable life. ⁵ When he is asked concerning his change of conduct in

respect to a certain transaction, he may be asked the reasons therefor on re-examination.⁶ So he may state why he has not taken the deposition of a certain important witness, referred to on cross-examination.⁷ When he is asked if he has held a conversation with one of the parties, he may be questioned as to the nature of such conversation;⁸ and, if he has given the substance of a conversation on cross-examination, he may be asked, on re-examination, to state the exact words of an important portion of it.⁹ If facts are called out on cross-examination which tend to impeach the integrity or character of the witness, he may, on re-examination, make explanations showing that such facts are consistent with his credibility as a witness, although such testimony would be otherwise irrelevant.¹⁰

1, *People v. Hanifan*, 98 Mich. 32; *Campbell v. State*, 23 Ala. 44, where the witness was asked if he was so unfriendly as to wish to see an innocent man convicted.

2, *State v. Gregory*, 33 La. An. 737.

3, *Com. v. Wilson*, 1 Gray 337.

4, *People v. Mills*, 94 Mich. 630.

5, *Carter v. Com.*, (Ky.) 13 S. W. Rep. 921.

6, *Baxter v. Abbott*, 7 Gray. 71.

7, *Redmon v. Piersol*, 39 Mo. App. 173. See also, *Walker v. State*, 136 Ind. 663.

8, *Somerville Ry. Co. v. Doughty*, 22 N. J. L. 495. But the court is not bound, in such case, to admit the declarations of the party in his own favor, *Winchell v. Latham*, 6 Cow. 682.

9, *Com. v. Armstrong*, 158 Mass. 78.

10, *United States v. Barrels of High Wines*, 8 Blatch. (U. S.) 475; *State v. Ezell*, 41 Tex. 35, where it was held that, if a witness had stated that he came from jail, it was proper for the party calling him to ask on what charge he had been committed.

§ 876. *Same, continued.*—We have seen that, when a conversation is called out by one party, the other party has the right to examine as to the *details of such conversation*.¹ The same rule applies on re-examination, after a witness has been cross-examined as to such conversation, but with the limitation that statements as to *wholly independent matters*, which do not relate to or explain the expressions used by the witness on cross-examination, are inadmissible.² Nor is the whole of a mere *hearsay narration* made admissible, on re-examination, by the fact that part of the same has been detailed on cross-examination without objection.³ On the re-examination, the inquiry is confined to *new matters* which have been developed or referred to during the cross-examination.⁴ Hence, the party calling the witness has no right, without the leave of the court, to re-enter upon the subjects inquired of in the direct examination.⁵ But since the general course of the examination of witnesses rests largely in the *discretion of the court*, it is not error for the trial judge to allow a re-examination as to matters which have been

touch upon in the examination-in-chief, or as to matters which may have been omitted,⁶ or for the purpose of laying a foundation for impeachment;⁷ and if, in the sound discretion of the court, the re-examination is not strictly confined to the matters referred to in the cross-examination, it is no ground for exception.⁸ But that which is strictly new matter cannot be introduced on re-direct examination;⁹ and it has sometimes been held, especially in criminal cases, that, if the new matter thus elicited is of a nature calculated to prejudice the minds of the jury, a new trial should be granted. The question is sometimes raised to what extent a party may *rebut incompetent or immaterial evidence* which he has permitted to be offered without objection. It is very clear that, in such case, the party seeking to rebut *can introduce no testimony* which has not a direct tendency to contradict that which has been received.¹⁰ But, in a former section, we have seen that, by one class of decisions, a party is estopped from excluding evidence offered in rebuttal or explanation of irrelevant testimony given in his own behalf;¹¹ and that, in another class of cases, it is held that reception of improper testimony without objection is no ground for admitting similar or explanatory evidence, when properly objected to.¹² If, in the discretion of the court, new matter is received in re-examination, or if explana-

tion of the answers given is necessary, the court may permit a *re-cross-examination*.

1, See sec. 822 *supra*.

2, Schaser v. State, 36 Wis. 429; People v. Buchanan, 145 N. Y. 1; 1 Greenl. Ev. sec. 467. See sec. 822 *supra*.

3, Wagner v. People, 30 Mich. 384; McCracken v. West, 17 Ohio 16. The Queen's Case, 2 Brod. & B. 298; 6 E. C. L. 154.

4, Dutton v. Woodman, 9 Cush. 255; 57 Am. Dec. 46; State v. Denis, 19 La. An. 119; Hamilton v. Miller, 46 Kan. 486; Chicago, R. I. & P. Ry. Co. v. Griffith, 44 Neb. 690.

5, Dutton v. Woodman, 9 Cush. 255; 57 Am. Dec. 46. See also, Winslow v. Covert, 52 Ill. App. 63.

6, Schaser v. State, 36 Wis. 429; State v. Gregory, 33 La. An. 737; Kendall v. Weaver, 1 Allen 277; Clark v. Vorce, 15 Wend. 193; 30 Am. Dec. 53; Marshall v. Davies, 78 N. Y. 414; Blake v. Stump, 73 Md. 160.

7, Richmond & D. Ry. Co. v. Vance, 93 Ala. 144.

8, See the cases above cited.

9, Schaser v. State, 36 Wis. 429.

10, Mowry v. Smith, 9 Allen 67; Lake Erie & W. Ry. Co. v. Morain, 140 Ill. 117; Parker v. Dudley, 118 Mass. 602; State v. Witham, 72 Me. 531; Brown v. Perkins, 1 Allen 89.

11, See sec. 169 *supra*; also the cases last cited.

12, State v. McGahey, 3 N. Dak. 293; Union Pac. Ry. Co. v. Reese, 56 Fed. Rep. 288; Carter v. State, 36 Neb. 481; State v. Donelon, 45 La. An. 744; People v. Murphy, 135 N. Y. 450. See sec. 169 *supra*.

§ 877. Use of memoranda to refresh the memory of witnesses.—Mr. Bentham has pointed out the advantages and disadvantages of allowing a witness on the stand to consult notes or memoranda for the pur-

pose of refreshing the memory. "On the one hand, what you want is a prompt and unpremeditated answer. If you allow him time to consult notes, you partly lose the advantage of that lively and quick examination which does not give bad faith time to think."¹ On the other hand, if this assistance is denied, the witness will often be unable to give accurate and complete testimony, and the whole object of the judicial investigation may be defeated. It is universally agreed that the balance between the two inconveniences is by no means equal and that, under proper limitations, witnesses may resort to memoranda or writings in aid of memory. Such is the frailty of human memory that very few witnesses would be able to testify as to particular dates, numbers, quantities and sums, after the lapse of a few years, if they were not permitted to refer to papers and writings which they knew to be correct at the time they were made.² It is even held that a witness, who has the means of aiding his memory by a recourse to memoranda or papers in his power, *can lawfully be required* to look at such papers, to enable him to ascertain a fact with more precision, to verify a date or to give more exact testimony than he otherwise could as to times, numbers, quantities and the like.³

1, Bentham Rationale Judicial Evidence cited in Goodeve Ev. 210. As to this general subject, see notes, 15 Am.

Dec. 194-198; 98 Am. Dec. 619-623; also articles, 23 Cent. L. Jour. 53; 26 Cent. L. Jour. 311.

2, Feeter v. Health, 11 Wend. 477.

3, Chapin v. Lapham, 20 Pick. 467; State v. Staton, 114 N. C. 813.

§ 878. Same — When allowed. — Mr. Phillips made the following classification of the cases in which writings are permitted to be used for the purpose of assisting the memory of the witness, which has been followed by Prof. Greenleaf and other writers, and which has often been approved: (1) "Where the writing is used only for the purpose of assisting the memory of the witness; (2) Where the witness recollects having seen the writing before, and, though he has now no independent recollection of the facts mentioned in it, yet he remembers that, at the time he saw it, he knew the contents to be correct; (3) Where the writing in question neither is recognized by the witness as one which he remembers to have before seen, nor awakens his memory to the recollection of anything contained in it; but nevertheless, knowing the writing to be genuine, his mind is so convinced that he is, on that ground, enabled to swear positively as to the fact." ¹ Among the many illustrations which might be given of writings or memoranda, which the courts have allowed to be used to refresh the memory of the witness, are books of account, though not themselves evidence or containing

the original entries,³ letters,⁴ bills of particulars of articles furnished, including such items as dates, weights and prices,⁴ or of goods lost in a fire in an action on an insurance policy,⁵ or schedules of stolen goods made by a clerk under the direction of the witness,⁶ way bills in a freight office,⁷ a ledger account,⁸ memoranda of payments in a private cash book,⁹ an account of sales kept at an auction,¹⁰ a copy of an itemized account in an action for goods sold,¹¹ the notes of a stenographer when he is a witness,¹² a statement made by a party to the witness, taken down at the time,¹³ memoranda made by an officer showing how he served process,¹⁴ the stub of a cash book¹⁵ and bills of exceptions, as to former testimony.¹⁶ In some jurisdictions, it is held that a witness may refer to a former affidavit or deposition given by him for the purpose of refreshing his memory.¹⁷ While in other states, this is not allowed, as it is held that the practice is in violation of the rule that a memorandum to refresh the memory should have been made at or about the time to which it relates.¹⁸

1. 1 Greenl. Ev. sec. 437; Phill. Ev. (3rd ed.) 411.

2, White v. Tucker, 9 Iowa 100; Flower v. Downs, 6 La. An. 539; Columbia v. Harrison, 2 Mill's Const. (S. C.) 213; Treadwell v. Wells, 4 Cal. 260; Jones v. Johns, 2 Cranch C. C. 426; Reed v. Jones, 15 Wis. 40; Schettler v. Jones, 20 Wis. 412; Murray v. Cunningham, 10 Neb. 167; Bonnet v. Glattfeld, 120 Ill. 166; Mead v. White, (Pa.) 8 At. Rep. 913.

- 3, Travelers Ins. Co. v. Sheppard, 85 Ga. 751.
- 4, International Ry. Co. v. Blanton, 63 Tex. 109; Avery v. Knight, 99 Mich. 311; Hudnutt v. Comstock, 50 Mich. 596; Rohrig v. Pearson, 15 Col. 127.
- 5, Stavinow v. Home Ins. Co., 43 Mo. App. 513; Johnston v. Farmers' Fire Ins. Co., (Mich.) 64 N. W. Rep. 5; Wise v. Phoenix Ins. Co., 101 N. Y. 637.
- 6, State v. Lull, 37 Me. 246.
- 7, Erie Preserving Co. v. Miller, 52 Conn. 444; 52 Am. Rep. 607.
- 8, Columbia v. Harrison, 2 Mill's Const. (S. C.) 213.
- 9, Converse v. Hobbs, 64 N. H. 42.
- 10, Cowles v. Hayes, 71 N. C. 230.
- 11, New York & C. Syndicate v. Fraser, 130 U. S. 611; Mead v. White, (Pa.) 8 At. Rep. 913.
- 12, State v. Cardoza, 11 S. C. 195; State v. George, (Minn.) 63 N. W. Rep. 100; Small v. Poffenbarger, 32 Neb. 234; Burbank v. Dennis, 101 Cal. 90; Watrous v. Cunningham, 71 Cal. 30. See also, People v. Kennedy, (Mich.) 63 N. W. Rep. 405.
- 13, For example, as to his financial standing, Hinchman v. Weeks, 85 Mich. 535. But Caldwell v. Bowen, 80 Mich. 382, holds contrary to the general rule, and also contrary to some of the cases cited in the decision itself.
- 14, McClaskey v. Barr, 45 Fed. Rep. 151.
- 15, Riordan v. Guggerty, 74 Iowa 688.
- 16, Solomon Ry. Co. v. Jones, 34 Kan. 443.
- 17, White v. State, 18 Tex. App. 57; State v. Miller, 53 Iowa 154; Hull v. Alexander, 26 Iowa 569; Atkin v. State, 16 Ark. 568; Burney v. Ball, 24 Ga. 505; Billingslea v. State, 85 Ala. 323. See sec. 346 *supra*.
- 18, Calloway v. Varner, 77 Ala. 541; Hull v. Alexander, 26 Iowa 569. In Morris v. Sackman, 68 Cal. 109, it was held that, to be admissible for the purpose, the affidavit must be shown to have been made when the facts were fresh in the mind of the witness.

1879. Non-production of memorandum.—Cross-examination.—It has been held that, when the *memorandum* is of the *first class*, above named, and is simply to assist the memory of the witness, it *need not be brought into court*, since the witness, finally testifies from his own recollection.¹ The principle is the same as where the memory has been refreshed by reference to any circumstance to which his mind has been drawn with peculiar force. Of course, the absence of the writing may go to the question of credibility.² Moreover the writing resorted to to refresh the memory *may be* of such character as to be wholly *unintelligible to any one but the witness himself*.³ Yet, if the paper is placed in the hands of the witness while on the stand, he may be *cross-examined as to the same*, since in no other way can the accuracy and recollection of the witness be ascertained; and it is only by the inspection of the paper and by such cross-examination that it can be ascertained whether the memorandum does assist the memory or not.⁴ Where, on cross-examination, a witness, at the request of counsel, produces a book to which he says he had referred to refresh his memory, it is *proper for counsel and the jury to inspect the entries* relating to the matter in issue, but the court may properly refuse such inspection of other private matters, having no connection with the case.⁵ In its discretion, the

court may *compel a witness to produce* a memorandum under his control which he has not produced.⁶

1, *State v. Cardoza*, 11 S. C. 195, 239; *State v. Collins*, 15 S. C. 373; 40 Am. Rep. 697; *Com. v. Ford*, 130 Mass. 64; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Folsom v. Apple River Log Co.*, 41 Wis. 602; *Cameron v. Blackman*, 39 Mich. 108; *Kensington v. Inglis*, 8 East 273; *Burton v. Plummer*, 2 Adol. & Ell. 341; 1 Greenl. Ev. sec. 437.

2, 2 Phill. Ev. (3rd ed.) 411.

3, *State v. Cardoza*, 11 S. C. 195, 239.

4, *State v. Bacon*, 41 Vt. 526; 98 Am. Dec. 616 and note; *Com. v. Haley*, 13 Allen 587; *Chute v. State*, 19 Minn. 271; *Rex v. Ramsden*, 2 Car. & P. 603.

5, *Com. v. Haley*, 13 Allen 587; *McKivitt v. Cone*, 30 Iowa 456; *Tibbetts v. Sternberg*, 66 Barb. (N. Y.) 201.

6, *Com. v. Lannan*, 13 Allen 563.

§ 880. Memoranda not made by witness.—In those cases where the witness, after seeing the memorandum or writing is able, by its aid, to recall the facts and testify to them as a matter of recollection, it is not necessary that the writing should have been made by the witness, for it is the recollection and not the memorandum which is evidence.¹ Thus, a witness has been permitted to refresh his memory from notes taken by counsel or other persons at a former trial,² or from his own deposition or testimony at a former trial or from a copy of the same,³ or from entries made by another under the directions of the witness and in his presence,⁴

or from memoranda, invoice books, account books or time books made by others, but referred to by the witness from time to time, or acted on by him and known by him to be correct.⁶ The same rule was applied where the officers of a hospital were witnesses and had their memories refreshed from contemporaneous records of the hospital, made by other persons,⁶ and where the witness has checked entries made by another person,⁷ or has actually seen money paid and a receipt given,⁸ or has read a memorandum to a party who had assented to its terms.⁹ But a witness should *not be allowed* to use any document or writing to refresh his memory which was made by another person, *unless he knows it to be correct.*¹⁰

1, Hill v. State, 17 Wis. 675; 86 Am. Dec. 736; Henry v. Lee, 2 Chit. 124; Coffin v. Vincent, 12 Cush. 98; Berry v. Jourdan, 11 Rich. L. (S. C.) 67; Davis v. Field, 56 Vt. 426; Com. v. Ford, 130 Mass. 64; Huff v. Bennett, 6 N. Y. 337; Bowden v. Spellman, 59 Ark. 251; State v. Lull, 37 Me. 246; Dorsey v. Gassaway, 2 Har. & J. (Md.) 402; 3 Am. Dec. 557; Cameron v. Blackman, 39 Mich. 108.

2, Reg. v. Philpots, 5 Cox Cr. C. 329; Beaubieu v. Cicotte, 12 Mich. 459, 468; Laws v. Reed, 2 Lew. C. C. 152. But see, Meagoe v. Simmons, 3 Car. & P. 75; Thompson v. State, 99 Ala. 173.

3, George v. Joy, 19 N. H. 544; People v. Palmer, (Mich.) 63 N. W. Rep. 656; Smith v. Morgan, 2 Moody & Rob. 257; Vaughan v. Martin, 1 Esp. 440; Com. v. Fox, 7 Gray 585, where the witness had signed the deposition only by a mark. See also cases cited in note 17 sec. 878 *supra*. See sec. 346 *supra*.

4, Doe v. Perkins, 3 T. R. 749; R. v. St. Martins, 2

Adol. & Ell. 215; State v. Lull, 37 Me. 246; Card v. Foot, 56 Conn. 369; Bowden v. Spellman, 59 Ark. 251.

5, Billingslea v. Smith, 77 Md. 504; Denver & R. G. Ry. Co. v. Wilson, 4 Col. App. 355; Miller v. Jannett, 63 Tex. 82; Bowden v. Spellman, 59 Ark. 251; Flint v. Kennedy, 33 Fed. Rep. 820 and note; Burrough v. Martin, 2 Camp. 112; Anderson v. Whalley, 3 Car. & K. 54; Reg. v. Langton, 13 Cox C. C. 345; Douglas v. Leighton, 57 Minn. 81; Atchison, T. & S. F. Ry. Co. v. Lawler, 40 Neb. 356.

6, State v. Collins, 15 S. C. 373; 40 Am. Rep. 697.

7, Burton v. Plummer, 2 Adol. & Ell. 341; Flint v. Kennedy, 33 Fed. Rep. 820 and note; Stebbings v. Dockery, 80 Wis. 618.

8, Rambert v. Cohen, 4 Esp. 213. But ordinarily a mere memorandum of a circumstance, made by the witness at the time of the occurrence, is not admissible in evidence to corroborate him, although he states that it is correct, Carr v. Stanley, 7 Jones (N. C.) 131; Urket v. Coryell, 5 Watts & S. (Pa.) 60; Gilmore v. Wilson, 53 Pa. St. 194. But see. Marcy v. Shultz, 29 N. Y. 346.

9, Bolton v. Tomlin, 5 Adol. & Ell. 856; Jacob v. Lindsay, 1 East 460; R. v. St. Martin's, Leicester, 2 Adol. & Ell. 210.

10, Fritz v. Burgiss, 41 S. C. 149; People v. Munroe, 100 Cal. 664. See also, Hamatite Min. Co. v. East Tenn., V. & G. Ry. Co., 92 Ga. 268.

§ 881. Copy used to refresh memory.

In all such cases as have just been discussed, a *copy of the entry* made by the witness or by another person may be *used to refresh the memory*.¹ Thus, a witness, who testifies that he made a correct written memorandum of certain facts at the time of their occurrence; that, the original being defaced, he had, before starting from home for the place of trial,

made a correct copy thereof, and that such copy having also become defaced, he had caused another copy to be made thereof which he knows to be correct, may use such second copy to refresh his memory at the trial.² So a witness may refresh his memory from entries made by an attorney as the items were read to him by the witness from an original memorandum book which is lost and which was compared by them.³ In like manner, a surveyor may refer to his transcript of his original notes;⁴ and a person may refresh his recollection as to an occurrence in his presence by referring to the account of it printed from his written report made at the time, when the witness knows that the printed report is substantially the same as the one made by him.⁵ In a New York case, in an action for articles lost in trunks, the memories of those engaged were set at work; and, as articles were brought to recollection from the bills of purchase and otherwise, they were set down upon different sheets of paper, and, when this process was completed, the contents of those papers were transcribed in gross. The plaintiff's wife used the completed and corrected memoranda to refresh her memory, and testified that she knew all the articles named in them were in the trunks; and the court held that such memoranda might be properly used for such purpose.⁶ In a Massachusetts case, the *rule* on

the subject is thus *summed up*: "In order to refresh the recollection of a witness, it is not important that the paper, book or memorandum should have been written or printed by the witness himself, or that it should be an original writing. It is sufficient if he saw it while the facts stated therein were fresh in his memory, and he knows that they are correctly transcribed or printed. Upon inspecting it, he can state the facts, if thereby called to his recollection."¹ In his work on evidence, Mr. Taylor suggests that it is questionable *whether a copy should be used* to refresh the memory *so long as the original is in existence*, and its absence unexplained; and, in some states, this view is maintained.² But the contrary rule has been declared in other jurisdictions, where it is held that, since the memorandum is in no sense evidence, the familiar rule as to best evidence has no application.³

1, *Marclay v. Schultz*, 29 N. Y. 346; *McCormick v. Pennsylvania Cent. Ry. Co.*, 49 N. Y. 303; *Lawson v. Glass*, 6 Col. 134; *Jaques v. Horton*, 76 Ala. 238, 244; *Berry v. Jourdan*, 11 Rich. L. (S. C.) 67; *Hinchman v. Weeks*, 85 Mich. 535; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Cameron v. Blackman*, 39 Mich. 108; *Finch v. Barclay*, 87 Ga. 393; *Bonnet v. Glatfeldt*, 120 Ill. 166.

2, *Folsom v. Apple River Log Driving Co.*, 41 Wis. 602.

3, *Mead v. McGraw*, 19 Ohio St. 55.

4, *Home v. MacKenzie*, 6 Clark & F. 628.

5, *Com. v. Ford*, 130 Mass. 64; 39 Am. Rep. 426; *Hawes v. State*, 88 Ala. 37, where numerous illustrations are given;

Topham v. McGregor, 1 Car. & K. 320. But where the author of the newspaper account cannot verify the statement and has no independent recollection, the article cannot be used as evidence, Downs v. New York Cent. Ry. Co., 47 N. Y. 83.

6, McCormick v. Pennsylvania Cent. Ry. Co., 49 N. Y. 303. See also, Stavinon v. Home Ins. Co., 43 Mo. App. 513.

7, Com. v. Ford, 130 Mass. 64, 66; Chapin v. Lapham, 20 Pick. 467; 1 Greenl. Ev. sec. 436.

8, Tayl. Ev. sec. 1408; Burton v. Plummer, 2 Adol. & Ell. 341; Chicago Ry. Co. v. Adler, 56 Ill. 344; Topham v. M'Gregor, 1 Car. & K. 320; Felkins v. Baker, 6 Lans. (N. Y.) 516; Jones v. Stroud, 2 Car. & P. 196. See also, Madegan v. Degraff, 17 Minn. 52.

9, Com. v. Ford, 130 Mass. 64; Caldwell v. Bowen, 80 Mich. 382. See also, Felkins v. Baker, 6 Lans. (N. Y.) 516.

§ 882. Must the memorandum be contemporaneous with the fact recorded. It is impossible to lay down any precise rule as to how nearly contemporaneous with the fact or facts recorded the memorandum must be. The courts have used expressions like the following: "The memorandum must have been presently committed to writing;"¹ "Written contemporaneous with the transaction;"² "While the occurrences mentioned in it were recent and fresh in his recollection;"³ "Contemporaneously, or nearly so, with the fact deposed to;"⁴ "At or shortly after the time of the transaction, and while it must have been fresh in his memory."⁵ It will be seen from an examination of the

authorities cited that, in determining this question, *very much must depend upon the circumstances of each case and the discretion of the trial judge*. It is clear that the memorandum must *not* be used merely to convey *original information* to the witness. "At the farthest, it ought to have been made before such a period of time has elapsed as to render it probable that the memory of the witness might have become deficient."⁶ Mr. Taylor suggests that, "if the witness will swear positively that the notes, though made *ex post facto*, were taken down at the time when he had a distinct recollection of the facts there narrated, he will in general be allowed to use them, though they were drawn up a considerable time after the transactions had occurred."⁷ But, if there are any *circumstances casting suspicion* upon the memoranda, the court should hold otherwise, as where the subsequent memorandum is prepared by the witness at the instance of an interested party or his attorney,⁸ or if the memorandum has been revised or corrected by such party or attorney.⁹

1, Sandwell v. Sandwell, Camberbachs 445.

2, Steinkeller v. Newton, 9 Car. & P. 313.

3, Burrough v. Martin, 2 Camp. 112.

4, Whitfield v. Aland, 2 Car. & K. 1015; Weston v. Brown, 30 Neb. 609.

5, Maxwell v. Wilkinson, 113 U. S. 656.

6, 1 Greenl. Ev. sec. 438; Lawson v. Glass, 6 Col. 134.

where memoranda of items of labor, made a month after the time, were allowed; *Jones v. Stroud*, 2 Car. & P. 196, where a copy of a memorandum, made the same year of the event, was not received; *Atchinson, T. & S. F. Ry. Co. v. Lawler*, 40 Neb. 356; *Ballard v. Ballard*, 5 Rich. L. (S. C.) 495, where, under peculiar facts, the next day was held too long a time; *Schwartz v. Chickering*, 58 Md. 290, sixteen months held to be too long a time; *O'Neale v. Walton*, 1 Rich. L. (S. C.) 234, two weeks held to be too long a time; *Maxwell v. Wilkinson*, 113 U. S. 656, twenty months held too long; *Spring Garden Ins. Co. v. Evans*, 15 Md. 54, five months held too long; *Weston v. Brown*, 30 Neb. 609, where the memorandum was not made until months afterwards.

7, *Tayl. Ev. sec. 1407*; *R. v. Sir A. Gordon Kinlock*, 25 How. St. Tr. 937; *Wood v. Cooper*, 1 C. & Kir. 645; *Johnston v. Farmers Fire Ins. Co.*, (Mich.) 64 N. W. Rep. 5, where a witness has been allowed to use a list of goods made from memory shortly before the trial.

8, *Steinkeller v. Newton*, 9 Car. & P. 313; *Bergman v. Shoudy*, 9 Wash. 331; *Schuyler National Bank v. Bollong*, 24 Neb. 825; *Spring Garden Ins. Co. v. Evans*, 15 Md. 54.

9, *Anon.*, cited by *Ld. Kenyon* in *Doe v. Perkins*, 3 T. R. 752, 754.

§ 883. Mode of using memoranda.—

The manner of using memoranda of this character is left largely to the discretion of the court; thus, when the memoranda are numerous, it is not error for the court to refuse to require the witness to lay the books aside, after examining them, before testifying.¹ If the witness cannot read and write, the proper practice is, not to read the memoranda to him in the presence of the jury, but to allow him to retire with counsel on each side and to have the memoranda read in his presence

without comment.¹ It has been held that a witness, either on direct or cross-examination, may be compelled to inspect a writing, if there is reason to believe that thereby his memory may be refreshed.² It is hardly necessary to state that it is *only when the memory needs assistance* that resort may be had to these aids; and that, if the witness has an independent recollection of the facts inquired about, there is no necessity or propriety in his inspecting any writing or memorandum.⁴

1. Johnson v. Coles, 21 Minn. 108; Chapin v. Lapham, 20 Pick. 467.

2. Com. v. Fox, 7 Gray 585.

3. State v. Stanton, 114 N. C. 813; Chapin v. Lapham, 20 Pick. 467.

4. State v. Baldwin, 36 Kan. 1.

§ 884. Use of memoranda when the witness has no independent recollection of facts.—Up to this point the discussion has been chiefly confined to the class of cases in which the memorandum or writing is in the stricter sense used to refresh the memory, that is, those cases where the witness has a present memory of the facts, after the inspection of the writings. Perhaps the second and third class of cases mentioned in the classification of Mr. Greenleaf, and already referred to,¹ may be quite as conveniently treated under a single head; and we will now consider

under what circumstances memoranda may be used which do not awaken such recollection. It is now well settled that a memorandum or writing may be used by the witness, not only when he can swear from actual recollection, but, in some cases, where the witness, after referring to such writing, can swear to a fact, not because he remembered it, but because of his *confidence in the correctness of the writing*.² It is necessary, in such cases, that the witness should be able to testify that the entry or writing was made *contemporaneously* with the event *and that at the time he knew the memorandum to be correct*.³ It is sometimes said that the witness is allowed to testify to the matter, so recorded, because he knows that he could not have made the entry unless the fact had been true.⁴ As *illustrations* of this rule, witnesses have been allowed to prove protest and notice, where their knowledge or belief depended solely on entries made by them,⁵ the acts of a surveyor,⁶ account books,⁷ minutes of testimony⁸ and receipts.⁹ In like manner, such memoranda have been used to prove the date of the delivery of articles,¹⁰ the amount of produce delivered,¹¹ entries by a bank clerk,¹² scandalous words presently reduced to writing,¹³ the facts as to a gambling transaction which were written down at once,¹⁴ memoranda of a town clerk, as to penalties for obstructing streets¹⁵ and the memorandum of a witness who measured and superintended the work done.¹⁶

- 1, See sec. 878 *supra*.
- 2, Davis v. Field, 56 Vt. 426. See also the cases cited below.
- 3, Costello v. Crowell, 133 Mass. 382; Howard v. McDonough, 77 N. Y. 592; Davis v. Field, 56 Vt. 426; Acklen's Ex. v. Hickman, 63 Ala. 494; 35 Am. Rep. 54.
- 4, Costello v. Crowell, 133 Mass. 352.
- 5, Bank of Tenn. v. Cowan, 7 Humph. (Tenn.) 70; Bulard v. Wilson, 5 Mart. N. S. (La.) 196.
- 6, Harrison v. Middleton, 11 Gratt. (Va.) 527.
- 7, Chamberlain v. Carter, 19 Pick. 188; Schittler v. Jones, 20 Wis. 412, though the books themselves might not be competent. Flint v. Kennedy, 33 Fed. Rep. 820 and note.
- 8, Clark v. Vorce, 15 Wend. 193; Halsey v. Sinsebaugh, 15 N. Y. 485.
- 9, Mangham v. Hubbard, 8 Barn. & C. 14.
- 10, Costello v. Crowell, 133 Mass. 352.
- 11, Wernwag v. Chicago Ry. Co., 20 Mo. App. 473.
- 12, Bank v. Baraef, 1 Rawle (Pa.) 152.
- 13, Sandwell v. Sandwell, Camberbachs 445.
- 14, State v. Rawles, 2 Nott & McC. (S. C.) 331.
- 15, Corporation of Columbia v. Harrison, 2 Mill's Const. (S. C.) 213.
- 16, Cleverly v. McCullough, 2 Hill (S. C.) 445.

§ 885. Further illustrations and decisions.—It is a familiar rule that the *attesting witness* to a deed or other document need not be able to remember the circumstances attending the execution of the instrument. It is enough if he can testify that his signature would not have been made, unless contemporaneous with the act, and for the purpose of

attestation.¹ In a Massachusetts case, a witness was allowed to testify to the delivery of goods, after looking at entries made by him in the *regular course of business*, although he had no recollection thereof. The court said: "It is obvious that this species of evidence must be admissible in regard to numbers, dates, sales and deliveries of goods, payments and receipts of money, accounts and the like, in respect to which no memory could be expected to be sufficiently retentive, without depending upon memoranda, and even memoranda would not bring the transaction to present recollection. In such cases, if the witness, on looking at the writing, is able to testify that he knows the transaction took place, though he has no present memory of it, his testimony is admissible."² Although the rule illustrated by the cases above referred to is no doubt the prevailing rule, it has sometimes been held by high authority that a witness cannot be allowed to testify to facts as to which he has *no recollection*, even though he is willing to assert that the memorandum is correct.³ Although there may be peculiar reasons for allowing a witness to refer to *memoranda including many details*, as where there are many items, dates or names which are readily forgotten, the rule is *by no means confined to memoranda of this character*, or to memoranda made in the *regular course of business*.⁴ In those cases where the memo-

random awakens no independent recollection, the *memorandum itself must be produced* in court, so that the witness may be properly cross-examined concerning it.¹

1, *Mangham v. Hubbard*, 8 Barn. & C. 14; *Burling v. Paterson*, 9 Car. & P. 570; *Hemphill v. Dixon*, 1 Hemp. (U. S.) 235; *Alvord v. Collin*, 20 Pick. 418; *New Haven Bank v. Mitchell*, 15 Conn. 206; *Hall v. Luther*, 13 Wend. 491; *Bennett v. Fulmer*, 49 Pa. St. 155.

2, *Dugan v. Mahony*, 11 Allen 572, where the court had rejected the entries as incompetent as independent evidence. Very many illustrations and an able discussion will be found in 2 Cowen & Hill's Notes to Phill. Ev., note 377.

3, *Doe v. Perkins*, 3 T. R. 749; *Erie Preserving Co. v. Miller*, 52 Conn. 444; 52 Am. Rep. 607; *Watts v. Sawyer*, 55 N. H. 38; *Harrison v. Middleton*, 11 Gratt. (Va.) 527; *Juniata Bank v. Brown*, 5 Serg. & R. (Pa.) 226, 232; *Lawrence v. Barker*, 5 Wend. 301, overruled in *Halsey v. Sinsebaugh*, 15 N. Y. 485; *Redden v. Spruance*, 4 Har. (Del.) 217; *Key v. Lynn*, 4 Litt. (Ky.) 338; *Vaslbinder v. Metcalf*, 3 Ala. 100; *Huckins v. People's Ins. Co.*, 31 N. H. 238; *Clark v. State*, 4 Ind. 156.

4, *State v. Rawles*, 2 Nott & McC. (S. C.) 331; *Sandwell v. Sandwell*, *Camberbachs* 445; *Clark v. Voyce*, 15 Wend. 195; *Halsey v. Sinsebaugh*, 15 N. Y. 485.

5, 1 Greenl. Ev. sec. 437; 1 Whart. Ev. sec. 518.

§ 886. **Other modes of refreshing memory—Use of memoranda as evidence.**—The memory of witnesses may be refreshed by other modes than the use of memoranda in writing. While a party cannot, as a rule, cross-examine his own witness, if a witness has given an ambiguous or indefinite answer, or if his memory is at fault,

the court, in the exercise of a proper discretion, may allow verbal inquiry as to statements or circumstances which may tend to enable the witness to recollect more clearly the fact sought to be proved.¹ The question sometimes arises *whether memoranda*, used to refresh the memory, are themselves to be *admitted in evidence*. Of course, the memoranda under discussion in this chapter must *not be confused* with such writings as *books of account* which, on grounds elsewhere discussed, are competent as evidence, when properly verified.² *When the witness*, after examining the memorandum, finds his memory so refreshed that he *can testify from recollection*, independently of the memorandum, there is no reason or necessity for the introduction of the paper or writing itself; and it is not admissible.³ In such case, the jury have no knowledge of the contents of the paper, unless opposing counsel call for such contents on cross-examination.⁴ Although it is clear that the document is not admissible as evidence when it so recalls the facts to the mind of the witness that he remembers them and can testify from his actual recollection, it has frequently been held that *another rule prevails when the witness*, after examining the memorandum, *cannot testify to an existing knowledge of the fact, independently of the memorandum, but can testify that*, at or about the time the writing was made, *he knew of its contents and of their*

truth or accuracy. In such cases, both the testimony of the witness and the contents of the memoranda are held admissible. "The two are the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum."⁵ But where the witness testifies fully as to all the matters in the memorandum, its rejection is not error.⁶

1, O'Hagen v. Dillon, 76 N. Y. 170; Stanley v. Stanley, 112 Ind. 143, where reference was made to testimony taken on a former trial; State v. Cummins, 76 Iowa 133; Battishill v. Humphrey, 64 Mich. 514. But hearsay evidence, such as conversations between a party and her attorney, cannot be used to refresh the memory of a witness, Radley v. Seider, 99 Mich. 431. See sec. 818 *supra*.

2, See sec. 582 *supra*.

3, Flood v. Mitchell, 68 N. Y. 507; Acklen's Ex. v. Hickman, 63 Ala. 494; 35 Am. Rep. 54; Russell v. Hudson River Co., 17 N. Y. 134; Marcy v. Shultz, 29 N. Y. 346; Brown v. Jones, 46 Barb. (N. Y.) 400; Meacham v. Pell, 31 Barb. (N. Y.) 65; Com. v. Jeffs, 132 Mass. 5; Field v. Thompson, 119 Mass. 151; Caldwell v. Bowen, 80 Mich. 382. But, after having sworn positively, a witness cannot refer to a memorandum for the purpose of corroborating his testimony, Sacket v. Spencer, 29 Barb. (N. Y.) 80.

4, Acklen's Ex. v. Hickman, 63 Ala. 494; 35 Am. Rep. 54. But see, Com. v. Jeffs, 132 Mass. 5, where the court refused the request of opposing counsel to have a paper read, after a witness had refreshed his memory from it.

5, Acklen's Ex. v. Hickman, 63 Ala. 494; 35 Am. Rep. 54; Jacques v. Horton, 76 Ala. 238; Watson v. Walker, 23 N. H. 471; Webster v. Clark, 30 N. H. 245; Tuttle v. Robinson, 33 N. H. 104; Howard v. McDonough, 77 N. Y. 592; Hoffman v. Chicago, St. P., M. & O. Ry. Co., 40 Minn. 60; Kunder v. Smith, 45 Ill. App. 368; Raux v.

Brand, 90 N. Y. 309; National Bank v. Madden, 114 N. Y. 280.

6, Butler v. Chicago, B. & Q. Ry. Co., 87 Iowa 206.

§ 887. **Witnesses not compelled to criminate themselves.**—It was a favorite maxim of the common law that no man should be compelled to criminate himself, *nemo tenetur seipsum accusare*.¹ This rule was established both on grounds of public policy and of humanity, "of policy, because it would place the witness under the strongest temptation to commit the crime of perjury, and of humanity, because it would be to extort a confession of truth by a kind of duress, every species and degree of which the law abhors."² The maxim had its origin in a protest against the inquisitorial methods of interrogating accused persons which long obtained in the continental system, and which prevailed in the early history of the common law. The change in the English criminal procedure was founded upon no statute, but upon general acquiescence of the courts in a popular demand; and the maxim, which was a mere rule of evidence in England, has assumed the form of constitutional enactments in this country which have long been regarded as safeguards of civil liberty and as sacred and important as the privileges of the writ of habeas corpus or any of the other fundamental guaranties for the protection of personal rights.³ It illustrates the application of this rule that, in

times of less religious toleration than the present, witnesses were excused from answering whether they were protestants or papists.⁴ So they have been held privileged from disclosing an attempt to improperly influence a juror;⁵ and the privilege has been claimed and allowed when the answer might tend to show the witness guilty of arson,⁶ misprision of treason,⁷ conspiracy,⁸ illegal voting,⁹ compounding a felony,¹⁰ larceny,¹¹ former acts of unchastity on the part of a female witness,¹² usury, when indictable,¹³ keeping a gaming house,¹⁴ libel,¹⁵ adultery¹⁶ and fraudulent disposition of property under an insolvency act.¹⁷ Where a witness testified that she had lived in a certain house, she was not obliged to answer an inquiry as to the character of the house, where it sufficiently appeared that the answer would tend to criminate her.¹⁸

1, Wing. Max. 486; Lofft. Max. 361. See also note, 38 Am. St. Rep. 897; 21 Am. Dec. 55-62; 4 L. R. A. 766; 11 L. R. A. 591. For a general discussion of the privilege of a witness as to criminating questions, see articles, 4 Crim. L. Mag. 323; 15 Cent. L. Jour. 305, 343, 364, 401; 1 Am. L. Reg. (N. S.) 534; 31 Alb. L. Jour. 144, 403; 2 Crim. L. Mag. 645; 32 Cent. L. Jour. 389. For the rule in the federal courts, see article, 5 Harv. L. Rev. 24.

2, Stark. Ev. 41.

3, *People v. Forbes*, 143 N. Y. 219; *Brown v. Walker*, 161 U. S. 591.

4, *R. v. Foelind*, 13 How. St. Tr. 16, 18; *R. v. Lord G. Gordon*, 21 How. St. Tr. 650; 2 Doug. 592.

5, *Grannis v. Branden*, 5 Day (Conn.) 260; 5 Am. Dec. 143.

- 6, *Rex v. Pegler*, 5 Car. & P. 521.
- 7, *Burr Trial*, 1 Rob. (N. Y.) 207.
- 8, *People v. Mather*, 4 Wend 236; 21 Am. Dec. 122.
- 9, *State v. Olin*, 23 Wis. 309.
- 10, *Pleasant v. State*, 15 Ark. 624; *Hayes v. Caldwell*, 10 Ill. 23.
- 11, *Howell v. Com.*, 5 Gratt. (Va.) 664.
- 12, *Reed v. Williams*, 5 Sneed (Tenn.) 580; 73 Am. Dec. 157; *Clifton v. Granger*, 86 Iowa 573.
- 13, *Bank of Salina v. Henry*, 2 Den. (N. Y.) 155; *Henry v. Bank of Salina*, 3 Den. (N. Y.) 593; *Fellows v. Wilson*, 31 Barb. (N. Y.) 162.
- 14, *Fisher v. Ronalds*, 16 Eng. L. & Eq. 417.
- 15, *Matter of Toppam*, 9 How. Pr. (N. Y.) 394.
- 16, *Smith v. Smith*, 116 N. C. 386, in a divorce case.
- 17, *En parte Clarke*, 103 Cal. 352.
- 18, *Com. v. Trider*, 143 Mass. 180.

§ 888. **Matters tending to criminate privileged.**—Since it is well settled that, if testimony is freely given by a witness, it may afterwards be used against him in another trial, it is obvious that the only safety of a witness lies in declining to disclose those facts which would *either criminate or tend to criminate* him.¹ He may not only refuse to answer as to the crime itself, but as to any circumstance, or any link in the chain of proof from which the crime may be inferred. Said Lord Tenterden: "You cannot only not compel a witness to answer that which will criminate him; but that

which tends to criminate him; and the reason is this that the party would go from one question to another and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him."² It is not the rule, however, that the privilege must always be extended to the witness, if asked. While the court should be extremely careful to protect the witness in this right, yet the danger must be something *more than a merely fanciful or imaginary danger*. It must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlucky contingency.³ The court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is *reasonable ground to apprehend danger* to the witness from his being compelled to answer, and that it would naturally subject him to actual punishment.⁴

1, United States v. Moses, 1 Cranch C. C. 170; People v. Forbes, 143 N. Y. 219; People v. Mather, 4 Wend. 229; 21 Am. Dec. 122; Minter v. People, 139 Ill. 363; 1 Burr's Trial 245; *Ex parte* Cohen, 104 Cal. 524; Com. v. Kimball, 24 Pick 359; 35 Am. Dec. 326; Simmons v. Holster, 13 Minn. 249; Warner v. Lucas, 10 Ohio 336.

2, Rex v. Slaney, 5 Car. & P. 213; Eaton v. Farmer, 46 N. H. 200; 1 Burr's Trial 244; Printz v. Cherney, 11 Iowa 469; Greenl. Ev. sec. 451; Best Ev. secs. 126, 127.

3, Reg. v. Boyes, 1 Best & Smith 329; State v. Thaden, 43 Minn. 253; Stevens v. State, 50 Kan. 712.

4, *Ex parte* Cohen, 104 Cal. 524.

§ 889. Statements of witness claiming privilege not conclusive.— Although there has been some conflict of opinion on this subject, and although it has sometimes been held by very high authority that the statement of the witness is conclusive,¹ yet it would seem to be the better rule that the *court is not bound by the sworn statement of the witness* that, in his belief, the answer would tend to criminate him.² If the rule were otherwise, it would be in the power of every witness to deprive parties of the benefit of his testimony by a mere pretence that his answers to questions would have a tendency to implicate him in some crime or misdemeanor or would expose him to a penalty or forfeiture. While it is the duty of the court to protect the witness in the exercise of his privilege, it is also the duty of the court to see that he does not, under the pretence of defending himself, screen others from justice.³ Though the witness will be compelled to answer when it appears to the court that such answer will not interfere with the privilege, yet the *court should be satisfied of this fact* and also that the witness is mistaken or acting in bad faith, when the claim of privilege is made;⁴ and when the fact of such danger is once made

to appear, *considerable latitude should be allowed* to the witness in judging for himself of the effect of any particular question, for it is obvious that a question, though at first sight apparently innocent, may, by affording a link in a chain of evidence, become the means of bringing home an offense to the party answering.⁵ But, where it is not manifest that the answer called for cannot so incriminate as to preclude all reasonable doubt or fair argument, the privilege should be recognized and protected.⁶ The witness will *not be required to explain in what manner the answer would criminate him*, as this would defeat the object of the rule;⁷ and, on *direct examination*, the witness may claim the privilege, if this would open the way to exposure on proper cross-examination.⁸

1, Warner v. Lucas, 10 Ohio 336; Fisher v. Ronalds, 17 Jur. 393; State v. Edwards, 2 Nott & McC. (S. C.) 13; 10 Am. Dec. 557; 1 Burr's Trial 244; Temple v. Com., 5 Va. L. J. 366.

2, Richman v. State, 2 G. Greene (Iowa) 532; Regina v. Garbett, 1 Den. Cr. C. 236; Sidebottom v. Adkins, 3 Jur. N. S. 631; Reg. v. Boyes, 1 Best & Smith 311; Com. v. Braynard, Thach. Cr. C. (Mass.) 146; State v. Duffy, 15 Iowa 425; Mahanke v. Cleland, 76 Iowa 401; Kirschuer v. State, 9 Wis. 140; State v. Lonsdale, 48 Wis. 348; State v. Thaden, 43 Minn. 253, where the privilege was refused when claimed by one whose name was alleged to be forged, when called to prove his signature; Phill Ev. (10th ed.) 488; Steph. Ev. art. 120. See article, 22 Am. L. Reg. 21.

3, 3 Phill. Ev. (10th ed.) 488.

4, Chamberlain v. Willson, 12 Vt. 491; 36 Am. Dec. 356; Janvrin v. Scammon, 29 N. H. 280; 1 Burr's Trial, 244.

5, *R. v. Boyes*, 30 L. J. (Q. B.) 301, 303, 304; *Stevens v. State*, 50 Kan. 712; *People v. Forbes*, 143 N. Y. 219; *Janvrin v. Scammon*, 29 N. H. 280.

6, See cases last cited.

7, *People v. Mather*, 4 Wend. 229; 21 Am. Dec. 122; 1 *Burr's Trial* 245; *Southard v. Rexford*, 6 Cow. 254.

8, *Printz v. Cheeney*, 11 Iowa 469.

§ 890. **Privilege extends to acts as well as words — When to be claimed.** — The privilege extends to the acts as well as the words of the witness, and it has frequently been held that a witness cannot be compelled to allow an *inspection* of parts of his person, when it would tend to criminate him.¹ Of course, when a party is required to submit his person for *inspection in a civil case*, as in an action for personal injury,² or in actions for divorce on the grounds of impotency,³ the right to such inspection rests on different grounds, and is not repugnant to the rule under discussion. It is the rule which prevails in England that the witness may claim the privilege at any time, even after he has voluntarily given some testimony on the subject.⁴ But it is generally held in this country that it is *too late* for the witness to *claim his privilege after he has*, without objection, *given testimony* concerning the matter tending to criminate him;⁵ and that, if he states a particular fact in favor of the party calling him, he is bound, on *cross-examination*, to state the circumstances relating to the fact,

though, in so doing, he may expose himself to a criminal charge.⁶ In the cases, however, where this rule has been applied, it has generally appeared that the witness had been cautioned, or otherwise had knowledge of his rights, and, if the court is satisfied that the witness has answered certain questions tending to criminate himself *in ignorance* of his rights or *under a misapprehension*, the privilege should still be recognized.⁷ We have already seen that, where a witness answers questions on direct examination without claiming his privilege, he must submit to a proper cross-examination, although such cross-examination may tend to criminate him.⁸ This rule applies with peculiar force when the *witness* is a *party* defendant in a *criminal case*. The object of the statutes allowing witnesses to testify in their own behalf is to promote the discovery of the truth, so far as can be done without injuring the rights of the witness or parties. While the accused cannot be compelled to testify, if he becomes a witness, he takes the hazard of the situation; he subjects himself to the *same rules of cross-examination as other witnesses*, and renders himself liable to be cross-examined upon all questions pertinent to his direct examination;⁹ and in some states, it is held, in such case, that he may be cross-examined upon all questions relevant to the issue.¹⁰

1, *Blackwell v. State*, 67 Ga. 76; 44 Am. Rep. 717; 3 Crim. Law Mag. 394, where it was held that the prisoner could not be required to exhibit his leg to the jury; *Day v. State*, 63 Ga. 669, where the same was held as to compelling the prisoner to put his foot in a shoe track; *Stokes v. State*, 5 Baxt. (Tenn.) 619; 30 Am. Rep. 72; *State v. Jacobs*, 5 Jones (N. C.) 259; *People v. McCoy*, 45 How. Pr. (N. Y.) 216; *Pritz v. State ex rel. Holden*, 33 Ind. 187. But see, *Williams v. State*, 98 Ala. 52, where it was held no error to require a witness to present herself to the jury, that they might better judge of her age; *State v. Ah Chuey*, 14 Nev. 79; 33 Am. Rep. 530; *State v. Graham*, 74 N. C. 646; 21 Am. Rep. 493, where it was held no error for the officers, on arresting the prisoner, to compel him to place his foot in shoe tracks; *Walker v. State*, 7 Tex. App. 245. See articles, 15 Cent. L. Jour. 2, 207. See sec. 402 *supra*.

2, *Schroeder v. Chicago Ry. Co.*, 47 Iowa 375. See sec. 398 *supra*.

3, *Devenbagh v. Devenbagh*, 5 Paige (N. Y.) 554; 28 Am. Dec. 443.

4, *R. v. Garbett*, 2 Car. & K. 474; *R. v. Inhabitants of Cliviger*, 2 T. R. 268.

5, *C. m. v. Pratt*, 126 Mass. 462; *Com. v. Price*, 10 Gray 472; 71 Am. Dec. 668; *State v. Allen*, 107 N. C. 805. In Iowa, it was held that when one of two defendants had testified before the grand jury, it was too late to claim the privilege on the trial, *State v. Van Winkle*, 80 Iowa 15; *The Boston Marine Ins. Co. v. Slocovitch*, 55 N. Y. S. 452; *People v. Teague*, 106 N. C. 576; *State v. Peffers*, 80 Iowa 580; *Com. v. Gould*, 158 Mass. 499.

6, *Foster v. Pierce*, 11 Cush. 437; 59 Am. Dec. 152; *State v. K—*, 4 N. H. 562; *Dixon v. Vale*, 1 Car. & P. 278; *East v. Chapman*, 2 Car. & P. 570; *Brown v. Brown*, 5 Mass. 320; *Chamberlain v. Willson*, 12 Vt. 491; 36 Am. Dec. 356; *State v. Treshour*, 1 Ky. L. Rep. 224. But where it is sought in the cross-examination to enter upon the investigation of entirely separate transactions, the privilege may be claimed on such cross-examination, *Lombard v. Mayberry*,

24 Neb. 674; 8 Am. St. Rep. 234; *People v. Meyer*, 75 Cal. 383.

7, *Mayo v. Mayo*, 119 Mass. 290.

8, See sec. 844 *supra*.

9, *People v. Casey*, 72 N. Y. 393; *Com. v. Nichols*, 114 Mass. 285; 19 Am. Rep. 346; *Com. v. Smith*, 163 Mass. 411; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *Spies v. People*, 122 Ill. 235; *State v. Wells*, 54 Kan. 161; *Este v. Wilshire*, 44 Ohio St. 636; *People v. O'Brien*, 66 Cal. 602, where it was held a violation of the constitutional provision to compel a defendant in a criminal action to testify, on cross-examination, as to matters not referred to in the examination-in-chief. See sec. 844 *supra*.

10, *Com. v. Lannon*, 13 Allen 563; *Com. v. Mullen*, 97 Mass. 545; *Com. v. Tolliver*, 119 Mass. 312; *McGarry v. People*, 2 Lans. (N. Y.) 227; *People v. Brown*, 72 N. Y. 571; 28 Am. Rep. 183; *People v. Tice*, 131 N. Y. 651. See secs. 844, 845 *supra*.

§ 891. No privilege, if testimony cannot be used to convict the witness.—The reason for the privilege ceases when the testimony called for could not under any circumstances be used against the witness; for example, he must answer, if the offense is barred by the statute of limitations,¹ or if he has been acquitted,² or if, by reason of a statute, his answer or the information derived therefrom cannot be used against him in any criminal proceeding for such offense.³ But the view has received judicial sanction that a witness should not be compelled to answer, when such answer might submit him to the ignominy and expense of a prosecution, although the statute of limitations might be

a defense, if pleaded. But the mere *fact that the prosecuting officer states* in open court *that he will not prosecute* the accused nor file any information against him does not change the rule.⁴ In England, there are many *statutes taking away the privilege* in particular cases, providing that, in such cases, no conviction shall be allowed upon any testimony given under compulsion which might otherwise be used to criminate the witness.⁵ Such statutes are less common in this country, but, in some states, they have been enacted for the purpose of more effectually punishing offenders in certain classes of offenses, such as keeping houses of ill fame, gaming, bribery, liquor selling and the like.⁶ Of course, the constitutional provisions which forbid that any person shall be compelled to criminate himself must be observed, and, when they are observed, such statutes are held *constitutional*.⁷

1, Calhoun v. Thompson, 56 Ala. 166; 28 Am. Rep. 754; Weldon v. Burch, 12 Ill. 374; United States v. Smith, 4 Day (Conn.) 121; Childs v. Merrill, 66 Vt. 302; Floyd v. State, 7 Tex. 215; Roberts v. Allatt, Moody & M. 192; McFadden v. Reynolds, (Pa.) 11 At. Rep. 638; Manchester & L. Ry. Co. v. Concord Ry. Co., 66 N. H. 100. Close v. Olney, 1 Den. 319. In Southern Ry. Co. v. Russell, 91 Ga. 808, it was held otherwise, unless it shall affirmatively appear that no prosecution, commenced in time, was then pending.

2, Lothrop v. Roberts, 16 Col. 250.

3, United States v. McCarthy, 18 Fed. Rep. 87; LaFontaine v. Southern Underwriters Assn., 83 N. C. 132; State v. Nowell, 58 N. H. 314; People v. Sharp, 107 N. Y. 427, a

celebrated case; *State v. Quarles*, 13 Ark. 307; *Kneeland v. State*, 62 Ga. 395; *Wilkins v. Malone*, 14 Ind. 153; *Ex parte Buskett*, 106 Mo. 602; *United States v. Smith*, 47 Fed. Rep. 501; *Ex parte Cohen*, 104 Cal. 524; *Minter v. People*, 139 Ill. 363. See the next section.

4, *Muller v. State*, 11 Lea (Tenn.) 18.

5, *Tayl. Ev. secs. 1455 et seq.* See article from Irish Law Times, reprinted in 15 Cent. L. Jour. 366.

6, *State v. Nowell*, 58 N. H. 314; *United States v. McCarthy*, 18 Fed. Rep. 87; *Kneeland v. State*, 62 Ga. 395; *Kendrick v. Com.*, 78 Va. 490; *State v. Warner*, 13 Lea (Tenn.) 52.

7, *People v. Kelly*, 24 N. Y. 74; *State v. Enochs*, 69 Ind. 314; *People v. Sharp*, 107 N. Y. 427, as to a proceeding before a legislative committee. See article, 32 Cent. L. Jour. 386.

§ 892. Same, continued. — Statutes of this character *must secure the witness* from future liability and exposure that will be prejudicial in any proceeding against him, *as fully and extensively as* he would be secured by availing himself of *the constitutional privilege*; and, if the privilege is taken away, it must be by clear and unequivocal enactment.¹ In New York, it was held that the fact that the information, thus elicited, may facilitate the discovery of other evidence by which the witness may be subsequently convicted is an incidental consequence, against which the constitution does not guard him.² But in a celebrated and comparatively recent case in the supreme court of the United States, a very different view was maintained. The case

arose out of an attempt to enforce the provisions of the inter-state commerce act, and construes the provision in the fifth amendment of the constitution of the United States which declares that "no person . . . shall be compelled, in any criminal case, to be a witness against himself," and also section 860 of the United States revised statutes which provides that "no pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding, or for the enforcement of any penalty or forfeiture: Provided, that this section shall not exempt any party or witness from prosecution and punishment for perjury committed in discovering or testifying as aforesaid." A witness refused to answer questions before a grand jury, on the ground that his answers might tend to criminate him. After elaborate discussion and after a review of the principal cases on the subject, the court held that the proceeding before the grand jury was a criminal case; that the meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself, but its object is to insure that a person shall not be

compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; that the constitutional provisions of the several states and of the United States should have a liberal construction, and that, although differently worded, they should have, as far as possible, the same interpretation; that legislation cannot detract from the privilege afforded by the constitution, and that no statute which leaves the party or witness subject to prosecution, after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the constitution of the United States; and that a *statutory enactment*, to be valid, *must afford absolute immunity against future prosecution for the offense to which the question relates.*³ But in 1893, congress passed an act providing among other things: "That no person shall be excused from testifying or from producing documents before the interstate commerce commission or in any proceeding, criminal or otherwise, based upon any legal violation of the act to regulate commerce, on the ground that the testimony required of him may criminate him. But no person shall be prosecuted on account of any transaction, matter or thing concerning which he may testify or produce evidence." After the passage of this act, a witness refused to testify before a grand jury, resting on his

alleged privilege of silence, and was committed for contempt. In a proceeding on a writ of habeas corpus, the supreme court of the United States construed the act in question as an act of *general amnesty*, within the power of Congress to enact, and which afforded immunity to the witness. It was also held that the act was in no way limited to prosecutions in the federal courts, that a person who commits a criminal act is bound to contemplate the consequences of exposure to his good name and reputation and the odium and disgrace which may follow, and that the fact that his testimony may bring him into disrepute, without incriminating him, does not entitle him to the privilege of silence, and hence that there is *no privilege under a statute which operates as a pardon.*⁴

1, Counselman v. Hitchcock, 142 U. S. 547; Emery's Case, 107 Mass. 172; 9 Am. Rep. 22; Horstman v. Kaufman, 97 Pa. St. 147; 39 Am. Rep. 802; Orme v. Crockford, 13 Price 376; United States v. James, 60 Fed. Rep. 257.

2, People v. Kelly, 24 N. Y. 74; People v. Sharp, 107 N. Y. 319.

3, Counselman v. Hitchcock, 142 U. S. 547, approving Emery's Case, 107 Mass. 172, above cited, and disapproving People v. Kelly, 24 N. Y. 74. As to the power of congressional and legislative committees to punish for contempt, see, Kilbourn v. Thompson, 103 U. S. 168; People *ex rel.* McDonald v. Keeler, 99 N. Y. 463.

4, Brown v. Walker, 161 U. S. 591.

§ 893. Privilege—How claimed—How waived.—We have already seen that the

witness may waive the privilege by *failing to make timely objection*.¹ For still stronger reasons, the privilege is waived, if no objection whatever is made.² The *privilege is that of the witness*; the objection must be taken by him, on his oath,³ after the question has been asked;⁴ and it cannot be raised by a party to the suit or by an attorney.⁵ Nor should the court interfere, but should leave the matter with the witness to avail himself of his privilege or not, as he sees fit.⁶ But it is the duty and usual *practice* of the judge to *apprise the witness* of his right;⁷ and, if a witness makes the claim of privilege and it is improperly disallowed by the court, it is *error* to which a party may except, since it is a violation of the rules of evidence.⁸ But where the judge declined to inform the witness as to his privilege, on the *mere demand of the party*, it has been held no error.⁹ *If a witness is compelled to answer*, when he is entitled to his privilege, and after the question has been properly raised, his *answer cannot be used against him in a subsequent criminal action*; such statements are regarded as given under compulsion and *duress*.¹⁰

1. See sec. 890 *supra*. See note, 21 Am. Dec. 61.

2. State v. Allen, 107 N. C. 805.

3. Kraus v. Sentinel Co., 62 Wis. 660; San Antonio Ry. Co. v. Muth, 7 Tex. Civ. App. 443; Lathrop v. Roberts, 16 Col. 250.

4, *Boyle v. Wiseman*, 10 Exch. 647; *Ex parte Richmond Stice*, 70 Cal. 51, mere general objection not enough.

5, *R. v. Kinglake*, 11 Cox 499; *Ingalls v. State*, 10 Cent. L. Jour. 317; *Clarke v. Reese*, 35 Cal. 89; *State v. Wentworth*, 65 Me. 234; 20 Am. Rep. 688; *Morgan v. Halberstadt*, 60 Fed. Rep. 592; *Ward v. People*, 6 Hill (N. Y.) 144; *Pickard v. Collins*, 23 Barb. (N. Y.) 444; *Com. v. Shaw*, 4 Cush. 394; *State v. Van Winkle*, 80 Iowa 15; *Day v. State*, 27 Tex. App. 143. Courts have refused to hear an argument of counsel on the question, *Doe ex dem. Rowcliffe v. Egramont*, 2 Moody & Rob. 386. But, of course, if the question is also irrelevant, counsel may make the objection, *Sharon v. Sharon*, 79 Cal. 633. In *Clifton v. Granger*, 86 Iowa 573, the privilege was claimed by the plaintiff, through her counsel.

6, *Williams v. Dickenson*, 28 Fla. 90; *Com. v. Bell*, 145 Pa. St. 374, bribery in congressional convention.

7, *Southard v. Rexford*, 6 Cow. (N. Y.) 254.

8, *Com. v. Kimball*, 24 Pick. 366.

9, *Com. v. Shaw*, 4 Cush. 594; *Attorney-General v. Radloff*, 10 Exch. 88; *Taylor v. State*, 83 Ga. 647.

10, *Reg. v. Garbett*, 1 Den. Cr. C. 236; *Horstman v. Kaufman*, 97 Pa. St. 147; 39 Am. Rep. 802; *State v. Bailey*, 54 Iowa 414. But in Massachusetts, the refusal of a witness to answer was held competent against him in a civil action, *Andrews v. Frye*, 104 Mass. 234.

§ 894. Effect of claiming privilege—

Inferences.—It has frequently been held that, in order to make the privilege of any value, *no unfavorable inference should be drawn from the refusal of a witness to answer a question because it may tend to criminate him, and that it is not a proper subject of comment by counsel before the jury.*¹ In sustaining the view that no unfavorable in-

ference should be drawn, it is urged that a perfectly honorable man might with honest indignation repudiate a question which he regards as insulting, and that it would be unfair to impute to him dishonorable motives.¹ On the other hand, the soundness of this view has been questioned; and it has been said that, "generally speaking, an honest witness will be eager to rescue his character from suspicion and will at once deny the imputation, rather than rely on his legal rights and refuse to answer the offensive interrogatory."² But whatever may be the view of judges and jurists on this question, it admits of no doubt that juries will act and do act to some extent upon the evidence furnished by their own senses, and that, almost inevitably, they will draw an unfavorable inference from the conduct of the witness who declines to answer lest he may criminate himself.

1, *People v. Maunusau*, 60 Mich. 15; *Phelin v. Kenderdine*, 20 Pa. St. 354; *Pinkard v. State*, 30 Ga. 757; *Carne v. Litchfield*, 2 Mich. 340; *Millinan v. Tucker*, Peake 222; *Rose v. Blakemore*, 1 Ryan & M. 384; *R. v. Watson*, 2 Stark. 158; *Lloyd v. Passingham*, 16 Ves. 64; 2 Phill. Ev. 417.

2, *R. v. Watson*, 2 Stark. 153.

3, Tayl. Ev. sec. 1467.

§ 895. Same — Penalties and forfeitures.—Under provisions contained in most of our constitutions that no one shall be com-

pelled to testify to his own criminality, it is held that the privilege *not only protects defendants* in criminal proceedings against themselves, *but witnesses* in the trial of issues between others.¹ The same general maxim or principle which protects the witness from self-crimination forbids that he should be compelled by his testimony to expose himself to a *forfeiture* or the payment of a *penalty*. In a leading case in the supreme court of the United States, the court construed the statute which authorized the federal courts, in revenue cases, and on motion of the government attorney, to require the defendant or claimant to produce his private books, invoices and papers in court, the penalty for refusal being that the allegations of the government should be taken as confessed. This statute was held to be unconstitutional, as applied to suits for penalties or to establish a forfeiture of the party's goods, as being repugnant to the fourth and fifth amendments of the constitution; and it was held that an order of the court, made under this statute, requiring the claimants of the goods to produce an invoice for the inspection of the government attorney, was an unconstitutional exercise of authority; that a proceeding to forfeit a person's goods for an offense against the laws, through civil information, is a criminal case within the meaning of the fifth amendment to the constitution. In dis-

cussing this subject, Mr. Justice Bradley used the following vigorous language: "Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime or to forfeit his property is contrary to the principles of a free government; it is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purpose of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom."² It was long considered doubtful whether a witness could be compelled, by his answer, to furnish information which might subject himself to a *civil action* or show that he owed a *debt*.³ This doubt was settled by a statute in the time of George III; and it is the general rule in this country that a witness is not privileged from testifying merely because his answer might expose him to *pecuniary loss*.⁴

1, *State v. Nowell*, 58 N. H. 314. Many of the cases already cited illustrate the same principle.

2, *Boyd v. United States*, 116 U. S. 616, 631; *Roberts v. Allatt, Moody & M.* 192; *Jackson v. Benson*, 1 *Younge & J.*, 32; *Bank of Salina v. Henry*, 2 *Den.* 155; *Henry v. Bank of Salina*, 3 *Den.* 593. *Best Ev. sec.* 126.

3, 6 *Parl. Deb.* 167-245; *Tayl. Ev. sec.* 1463.

4, *Davis v. Lincoln Nat. Bank*, 4 *N. Y. S.* 373; *Lowney v. Perham*, 20 *Me.* 240; *Bull v. Loveland*, 10 *Pick.* 9; *Taney v. Kemp*, 4 *Har. & J. (Md.)* 348; 7 *Am. Dec.* 673; *Stevens v. Whitcomb*, 16 *Vt.* 121; *Cox v. Hill*, 3 *Ohio* 424; *Alexander v. Knox*, 7 *Ala.* 503.

§ 896. **Objections and exceptions to evidence.**—It is undoubtedly the policy of the law to admit testimony when offered, unless some clear reason exists for its exclusion. Competency is presumed until the contrary is shown. Since parties are usually represented in court by attorneys presumed to be vigilant in the protection of their rights, it is the general practice of the courts to receive evidence which is offered, unless it is objected to. But the *trial judge* is not bound to wait for objections; he *may exclude improper testimony of his own motion*.¹ As the appellate courts are not organized to hear causes *de novo* but to review the errors of the inferior courts, if a party would take advantage of the admission of improper testimony on appeal or on motion for new trial, it is *necessary to make objection at the time it is offered*.² It is too late after evidence is submitted to the jury,³ or after motion in arrest of judgment.⁴ On the same general principle, the court is not compelled to exclude inadmissible testimony, received in response to a question to which no objection was made;⁵ and in such case, where the answer is responsive to the question, the court may properly overrule a motion to strike out the answer.⁶ It is also a familiar rule that *mere general objections*, without the statement of any specific ground of objection, will not be reviewed in the appellate court or constitute ground for a new

trial.⁷ It is only fair that the trial judge should have the opportunity to pass upon the precise question involved, and that the nature of the objection should be pointed out;⁸ and also that the opposing counsel should have the opportunity to remove the objection, or supply the defect by other testimony.⁹ As illustrations of the rule, it has been held that a mere *general objection to secondary evidence* does not suffice.¹⁰ When objection is made to the admission of a record or a document, it is not sufficient to object generally or that the law has not been complied with, or that the evidence is incompetent, irrelevant and immaterial; but any objection to the manner of authentication or execution should assign the grounds thereof.¹¹ On the same principle, it has been held that the objection that the evidence is "illegal and incompetent,"¹² or "inadmissible,"¹³ or "incompetent" is unavailing.¹⁴

1, See section 169 *supra*.

2, Ladd v. Smith, (Ala.) 10 So. Rep. 836; Gardner v. Gooch, 48 Me. 487. See cases cited below. As to depositions, see secs. 691 *et seq. supra*.

3, King v. State, 21 Ga. 220; Laurent v. Vaughn, 30 Vt. 90.

4, Thomson v. Wilson, 26 Iowa 120; Perrott v. Shearer, 17 Mich. 48.

5, Vermillion Well Co. v. Vermillion, (S. Dak.) 61 N.W. Rep. 802; Omaha So. Ry. Co. v. Beeson, 36 Neb. 361; Washington v. State, (Ala.) 17 So. Rep. 546; Perkins v. Brainard Quarry Co., 32 N. Y. S. 230; Cleveland, C. C. & I. Ry. Co. v. Wynant, 134 Ind. 681.

6, *Ellinger v. Rawlings*, 12 Ind. App. 336; *Lake Shore & M. S. Ry. Co. v. McIntosh*, 140 Ind. 261.

7, *O'Hagen v. Clinesmith*, 24 Iowa 249; *White v. Chadbourne*, 41 Me. 149; *Stone v. Hunt*, 114 Mo. 66; *Abbott v. Chaffee*, 83 Mich. 256; *Howard v. Howard*, 52 Kan. 470; *Galbreath v. Doe*, 8 Blackf. (Ind.) 366; *Rhea v. Crunk*, 12 Ind. App. 23; *Hutchinson v. Whitman*, 95 Mich. 592, where it was held insufficient objection to say: "I object." As to depositions, see sec. 692 *supra*.

8, *United States v. McMasters*, 4 Wall. 680; *Brown v. Weightman*, 62 Mich. 557; 1 *Thomp. Trials* sec. 693.

9, *King v. Nichols & S. Co.*, 53 Minn. 453; *Motley v. Head*, 43 Vt. 636; *Rush v. French*, 1 *Ariz.* 99.

10, *Liebenthal v. Price*, 8 Wash. 206; *Toplitz v. Hedden*, 146 U. S. 252; *Woodward v. Shaw*, 18 Me. 304; *Concord v. McIntire*, 6 N. H. 527; *Kenosha Stove Co. v. Shedd*, 82 Iowa 540.

11, *Stanley v. Holliday*, 13 Ind. 464; *Crawford v. Witherbee*, 77 Wis. 419; *State v. Gates*, 20 Mo. 400; *New Orleans, J. & G. Ry. Co. v. Moye*, 39 Miss. 374; *Voss v. State*, 9 Ind. App. 294.

12, *Clark v. Conway*, 23 Miss. 438; *Steiner v. Trantum*, 98 Ala. 315.

13, *Leet v. Wilson*, 24 Cal. 398; *Fowler v. Wallace*, 131 Ind. 347.

14, *Pennsylvania Co. v. Horton*, 132 Ind. 189; *Jones v. Angell*, 95 Ind. 376; *Kernoehen v. New York EL Ry. Co.*, 128 N. Y. 559.

1897. Same, continued.—Following the rule stated in the last section, the objection that evidence is "irrelevant, incompetent and immaterial" does not suffice, if the testimony is admissible for any purpose.¹ Nor does the objection that evidence is irrelevant or immaterial or improper avail as an objection to

the competency of the witness,² or the admissibility of records,³ or that the testimony would contradict or vary a written contract.⁴ It has frequently been held that objections to evidence as incompetent, irrelevant or immaterial may be disregarded as too general, unless a sufficient reason for its exclusion appears from the evidence offered itself.⁵ But where the proposed evidence is not competent for any purpose, such an objection is sufficient.⁶ It has sometimes been held that, where a question is *plainly irrelevant*, a mere general objection is sufficient.⁷ Where evidence is objected to as inadmissible for certain specified reasons, the objection will be deemed *limited to the grounds specified*.⁸ But in the absence of an understanding between counsel and the court, that evidence is to be limited to particular matter, the court may consider it for any purpose for which it is competent and relevant.⁹ It is a familiar rule that a mere *general objection to testimony as a whole* does not avail *when part of the testimony is admissible*.¹⁰ But when there has been a sufficient and specific objection to testimony, it is not necessary to *repeat the objection* whenever testimony of the same class is offered.¹¹ The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case, the party against whom the ruling was made cannot urge that the objection was too general.¹² And when the

offer of testimony includes that which is admissible with that which is not, and the *competent and incompetent* are *blended together*, it is not the duty of the court to separate the legal from the illegal, but the whole may be rejected when objection is made.¹³ Error cannot be assigned on a ruling rejecting an *offer of testimony*, unless it appears that the offer was made in good faith. If the trial judge has doubts about the good faith of an offer of testimony, he may insist upon the production of the witness and upon some attempt to make the proof before he rejects the offer; but if he does reject it, and allows a bill of exceptions which shows that the offer was actually made and refused, and there is nothing else in the record to indicate bad faith, an appellate court must assume that the proof could have been made, and govern itself accordingly.¹⁴

1, *Rush v. French*, 1 Ariz. 99; *Alcorn v. Chicago & A. Ry. Co.*, 108 Mo. 81; *Voorman v. Voight*, 46 Cal. 397; *Lake Erie & W. Ry. Co. v. Parker*, 94 Ind. 91; *Schlereth v. Missouri Pac. Ry. Co.*, 115 Mo. 87, expert evidence.

2, *Cornell v. Barnes*, 26 Wis. 473; *Chicago, K. & N. Ry. Co. v. Behney*, 48 Kan. 47; *Carter v. New York El. Ry. Co.*, 134 N. Y. 168.

3, *Voss v. State*, 9 Ind. App. 294.

4, *Union Cash Reg. Co. v. John*, 49 Minn. 481.

5, *McClosky v. Davis*, 8 Ind. App. 190; *Glenville v. St. Louis Ry. Co.*, 51 Miss. 629.

6, *Lowenstein v. McCadden*, 92 Tenn. 614.

7, *Bates v. Morris*, 101 Ala. 282.

8, Triggs v. Jones, 46 Minn. 277; Bailey v. Chicago, M. & St. P. Ry. Co., 3 S. Dak. 531; Evansville Ry. Co. v. Swift, 128 Ind. 34; Giles v. Vandiver, 91 Ga. 192. See secs. 710, 711 *supra*.

9, Sears v. Starbird, 78 Cal. 225.

10, Beebe v. Bull, 12 Wend. 504; Mock v. City of Muncie, 9 Ind. App. 536; Grimm v. Dundee, L. & I. Co., 55 Mo. App. 457; Curr v. Hundley, 3 Col. App. 54; Brown v. Point Pleasant, 36 W. Va. 290; Wilson v. Equitable Gas Co., 152 Pa. St. 566. See secs. 710, 711 *supra*.

11, Whitney v. Traynor, 74 Wis. 289; Gilpin v. Gilpin, 12 Cal. 504; Sharon v. Sharon, 79 Cal. 633.

12, Hurlbut v. Hall, 39 Neb. 889.

13, Clark v. Ryan, 95 Ala. 406; First Nat. Bank v. North 2 S. Dak. 480.

14, Scotland Co. v. Hill, 112 U. S. 183, 186.

§ 898. Withdrawing and striking out evidence.—It sometimes happens that *answers* are made which are *not responsive* to questions, unobjectionable in themselves, or that *improper testimony* is *volunteered* to which there is no opportunity to object in advance. In such cases, the proper *remedy is to move promptly to strike out* the objectionable testimony.¹ It is *a matter of right*, on proper motion, to have testimony stricken out which is irresponsive and prejudicial; and the error of the court in this respect is subject to review by the appellate court.² If no such motion is made, the reception of such testimony is not error;³ and if the motion to strike out is not promptly made, the *right is waived*.⁴ The rule is the same as to improper testimony

given in response to a question by the party injured thereby.⁵ But a party has no right to move to strike out testimony merely because it is unfavorable to him,⁶ and it is not sufficient in such cases to merely object to the evidence after it is received.⁷ Nor is the motion to strike out testimony available where the party against whom it is offered makes no objection to *questions which clearly call for improper evidence*. One who has thus taken his chances of advantage has not, when he finds the testimony prejudicial, the legal right to exclude it.⁸ Where evidence has been properly received, and its effect has been destroyed by other evidence, or its *inadmissibility becomes apparent afterward*, the party against whom it has been received has no absolute right to have it stricken out, but should request the court to charge the jury to disregard such evidence.⁹ But it is within the discretion of the court in such case to strike out the testimony.¹⁰ A *motion to strike out* testimony should specify the objection, as well as the portion of the evidence objected to; and a motion to strike out all of certain evidence should not be sustained, if a part of the evidence is relevant and competent.¹¹ The weight of authority sustains the proposition that the *error of receiving irrelevant and incompetent testimony is cured*, if the testimony is afterwards stricken out by order of the court, or if the jury are plainly instructed to

disregard it. This rule is based upon the ground that it will not be presumed that juries are too ignorant to comprehend or too unmindful of their duties to fail to respect instructions as to matters which are peculiarly within their province to determine. The appellate court will rather presume that juries are influenced in their verdict only by legal evidence.¹² But some of the cases cited upon this proposition are based upon the ground that the evidence stricken out or withdrawn from the consideration of the jury had evidently not influenced the verdict; and there is high authority for the view that the error is not cured, if it is impossible to say that the improper testimony did not influence the jury, notwithstanding the action of the court. The general rule to be gathered from the cases may be state as follows: "If, in any case, there is good reason to believe that injury has been done to the adverse party by the introduction of such evidence, notwithstanding the caution and instructions of the court, that will furnish a sufficient cause for sending the case to another trial. But, unless there is good ground for suspicion, it must be presumed that the instructions of the court were not disregarded."¹³

1, Gould v. Day, 94 U. S. 405; Holmes v. Roper, 141 N. Y. 64; Wendt v. Chicago, St. P., M. & O. Ry. Co., 4 S. Dak. 476. See sec. 710 *supra*.

2, See cases cited below.

3, *Corcoran v. City of Detroit*, 95 Mich. 84; *Link v. Sheldon*, 136 N. Y. 1; *National Syrup Co. v. Carlson*, 155 Ill. 210; *Payne v. Dieus*, 88 Iowa 423; *Kansas Fire Ins. Co. v. Hawley*, 46 Kan. 746; *Bailey v. Bailey*, (Iowa) 63 N. W. Rep. 341; *Chicago, P. & St. L. Ry. Co. v. Blume*, 137 Ill. 448; *Lewars v. Weaver*, 121 Pa. St. 268; *Chicago, St. L. & P. Ry. Co. v. Champion*, 9 Ind. App. 510. See sec. 896 *supra*.

4, *Haverly v. Elliot*, 39 Neb. 201; *Tebo v. Augusta*, 90 Wis. 405; *Chicago, St. L. & P. Ry. Co. v. Champion*, 9 Ind. App. 510.

5, *Birmingham L. Co. v. Brinson*, 94 Ga. 517.

6, *East Tenn., V. & G. Ry. Co. v. Turvaille*, 97 Ala. 122.

7, *Link v. Sheldon*, 136 N. Y. 1; *Holmes v. Roper*, 141 N. Y. 64; *Kansas City, M. & B. Ry. Co. v. Phillips*, 98 Ala. 159; *Ft. Worth & R. G. Ry. Co. v. Andrews*, 7 Tex. Civ. App. 321; *Falvey v. Jackson*, 132 Ind. 176; *Overley v. Chesapeake & O. Ry. Co.*, 37 W. Va. 524.

8, *Levin v. Russell*, 42 N. Y. 251; *Cleveland, C., C. & I. Ry. Co. v. Wynant*, 134 Ind. 681; *Wheelock v. Godfrey*, 100 Cal. 578; *Haines v. Saviers*, 93 Mich. 440; *Way v. Johnson*, 5 S. Dak. 237; *Wiggins v. Guthrie*, 101 N. C. 661; *Hickman v. Green*, 123 Mo. 165; *State v. Hope*, 100 Mo. 347; *Ellinger v. Rawlings*, 12 Ind. App. 336.

9, *Gawtry v. Doane*, 51 N. Y. 84; *Marks v. King*, 64 N. Y. 628; *Platner v. Platner*, 78 N. Y. 90; *Gilmore v. Pittsburg Ry. Co.*, 104 Pa. St. 275. So where immaterial testimony has been admitted on the promise of the attorney that it would be shown to be material, *Forsyth v. Ganson*, 5 Wend. 558; *Blackburn v. Beall*, 21 Md. 208.

10, *Pontius v. People*, 82 N. Y. 339; *Platner v. Platner*, 78 N. Y. 90.

11, *McGuffy v. McClain*, 130 Ind. 327; *Chicago, St. L. & P. Ry. Co. v. Champion*, 9 Ind. App. 510; *Birmingham L. Co. v. Brinson*, 94 Ga. 517; *McCabe v. Brayton*, 38 N. Y. 196; *Davis v. Hopkins*, 18 Col. 153; *Spaulding v. Hallenbeck*, 35 N. Y. 204; *Roberts v. Burgess*, 85 Ala. 192

12, *Waterman v. Chicago & A. Ry. Co.*, 82 Wis. 613; *Holmes v. Moffat*, 120 N. Y. 159; *Gall v. Gall*, 114 N. Y. 109; *Busch v. Fisher*, 89 Mich. 192; *Pennsylvania Co. v. Roy*, 102 U. S. 451; *Alabama G. S. Ry. Co. v. Frazier*, 93 Ala. 45; *Blizzard v. Applegate*, 77 Ind. 527; *Sullens v. Chicago, R. I. & P. Ry. Co.*, 74 Iowa 659; *Union Water Co. v. Crary*, 25 Cal. 504. See also, *Hogendobler v. Lyon*, 12 Kan. 276.

13, *Deerfield v. Northwood*, 10 N. H. 269, 271; *The G. C. & S. F. Ry. Co. v. Levy*, 59 Tex. 542; *Specht v. Howard*, 16 Wall. 564; *Smith v. Whitman*, 6 Allen 562; *Taylor v. Adams*, 58 Mich. 187. See also, *Richards v. Noyes*, 44 Wis. 639.

1899. Effect of improper admission and exclusion of evidence.—The question constantly arises in the courts whether a new trial should be granted on the ground of the improper admission or exclusion of evidence. It is obviously impossible to lay down any rule on this subject which will not, in individual cases, cause hardship to the litigant. On the one hand, it would be clearly unjust to establish the rule that a new trial should be granted in every case where errors have intervened, without any regard to their effect upon the jury. On the other hand, since it is often difficult and sometimes impossible for the appellate court to determine the effect which improper testimony may have had upon the minds of the jury, there are serious objections to a practice which permits speculation on that subject. A very conservative rule was thus stated on this subject by a great judge: "Where evidence has been improperly

received or rejected, and the verdict is found against the party taking the exception, and a motion for a new trial is made on that ground, such motion will not be granted, if the court can see plainly from the whole evidence that, independently of the evidence received or rejected, the evidence in support of the verdict so decidedly preponderates that a verdict the other way would be set aside as against evidence."¹ Another learned judge somewhat more broadly stated the rule which has received wide support: "I think the correct rule in regard to the granting or refusing of a new trial for the admission of irrelevant or improper evidence is this: where the exceptionable evidence is of little weight compared with the rest of the proof, and the latter clearly justifies the finding of the jury, a new trial will not be granted; but it must in all cases appear very satisfactorily that the verdict must and ought to have been the same, whether the questionable evidence was admitted or not."² Upon this general principle, it is a very *familiar practice to deny a new trial where* the court is of the opinion that *the error* in receiving or excluding evidence was *not prejudicial*;³ and it will be inferred that there is no prejudice from the improper admission of evidence where other and competent evidence to the same effect is uncontradicted or overwhelming,⁴ or is sufficient to sustain the decree,⁵ or when the same

facts are proved by the objecting party,⁶ or where it is evident that the result would have been the same, even if the error excepted to had not been committed.⁷ It is also held that the *erroneous reception of cumulative* evidence is harmless where the facts, thus proven, are otherwise legally shown.⁸

1, Thorndike v. City of Boston, 1 Met. 242, 249.

2, Smith v. Russ, 22 Wis. 439; Winkley v. Foye, 33 N. H. 171; 66 Am. Dec. 715 and note.

3, Montross v. Eddy, 94 Mich. 100; Miller v. James, 86 Iowa 242; Dimmick v. Milwaukee Ry. Co., 18 Wis. 471; Rosenbaum v. Russell, 35 Neb. 513; Chicago & G. W. Ry. Co. v. Wedel, 144 Ill. 9; Hornbuckle v. Stafford, 111 U. S. 389; Wing v. Chesterfield, 116 Mass. 353; State v. Woodruff, 47 Kan. 151; 27 Am. St. Rep. 285; Cahill v. Murphy, 94 Cal. 29; 28 Am. St. Rep. 88; Woods v. Gaar, 99 Mich. 301; Consaul v. Sheldon, 35 Neb. 247, where the fact was admitted by the pleadings.

4, Reed v. City of Madison, 85 Wis. 667; Phoenix Ins. Co. v. Pickel, 3 Ind. App. 332; LaDuke v. Exeter, 97 Mich. 450; 37 Am. St. Rep. 357.

5, McKay v. Riley, 135 Ill. 586.

6, Doll v. People, 145 Ill. 253.

7, Terry v. Beatrice Starch Co., 43 Neb. 866; Frisk v. Reigelman, 75 Wis. 499; City of Dallas v. Miller, 7 Tex. App. Civ. 503, and cases above cited.

8, Chase v. Caryl, (N. J. L.) 31 At. Rep. 1024; McLendon v. Frost, 57 Ga. 448. See secs. 7 *supra*, 902 *infra*.

§ 900 Same, continued. — If *irrelevant* or *incompetent evidence* is received *which has a tendency to prejudice* the minds of the jury or to mislead them, a new trial should be

granted;¹ and the rule has sometimes been declared that a new trial will be granted, unless it can be seen that such evidence could have had no influence upon the jury.² The following test was given by the court of appeals of New York: "When the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it cannot be said that the losing party is not prejudiced by material evidence testified to by an incompetent witness against his objection."³ And so long as the chances are equal that it may have had some effect one way or the other, the party excepting is entitled to the benefit of the principle that irrelevant testimony should be shut out from the jury.⁴ *In equity cases*, it will be *presumed that the trial judge disregarded incompetent or irrelevant testimony*; and errors in the admission of such evidence do not afford ground for reversal where there is sufficient testimony to support the decree.⁵ The fact that incompetent testimony has been received is not sufficient ground for reversing the judgment where the *case is tried without a jury*. In such case, the appellate court will give no weight to such testimony in the determination of the appeal, and will not reverse the judgment on that account.⁶

1, *Rooney v. Milwaukee Chair Co.*, 65 Wis. 397; *Center v. Center*, 41 N. H. 405; *Com. v. Bosworth*, 22 Pick. 397; *Francis v. Butler M. Ins. Co.*, 4 R. I. 159.

2, *Santillan v. Moses*, 1 Cal. 92; *Owen v. Jones*, 14 Ark. 502; *Foye v. Leighton*, 24 N. H. 29; *Ames v. Potter*, 7 R. I. 265; *Field v. Avery*, 17 Wis. 672; *Harrison v. Baker*, 15 Neb. 43; *Hutchins v. Hutchins*, 98 N. Y. 56.

3, *In re Eysaman's Will*, 113 N. Y. 62.

4, *Farmers' Bank v. Whinfield*, 24 Wend. 419; *Hoberg v. State*, 3 Minn. 262.

5, *Kleinmann v. Gieselmann*, 114 Mo. 437; 35 Am. St. Rep. 761; *Liverpool & L. & G. Ins. Co. v. Buckstaff*, 38 Neb. 146; 41 Am. St. Rep. 724; *Ritter v. Schenk*, 101 Ill. 387.

6, *Frisk v. Reigelman*, 75 Wis. 499.

§901. Weight of evidence—Positive and negative.—In other parts of this work frequent allusion has been made to the weight of the various kinds of evidence which have been there discussed. At this point it is only necessary to briefly call attention to one or two branches of the subject not elsewhere referred to. It is a general rule of evidence that *affirmative testimony is stronger than negative*; in other words, that "the testimony of a credible witness, that he saw or heard a particular thing at a particular time and place is more reliable than that of an equally credible witness who, with the same opportunities, testifies that he did not hear or see the same thing at the same time and place."¹ The reason for this rule is that the witness who testifies to a negative may have forgotten what actually occurred, while it is impossible to remember what never existed.² But, in applying the rule, much depends upon circum-

stances, such as the opportunity of witnesses for knowing and the attention which they have given to the matter; and the mere fact of one witness testifying directly contrary to another does not discredit either;³ the attention of the jury should be directed to the facts and circumstances of the case to prevent the unjust operation of the rule.⁴ Thus, the fact that certain witnesses heard a whistle and bell of an engine at a crossing is not necessarily in conflict with the testimony of others who heard nothing, for the observation of the fact by some is entirely consistent with the failure of others to observe.⁵ Where two witnesses directly contradict each other, and the veracity of neither is impeached, the presumption of truth is in favor of the witness who swears affirmatively.⁶ So the positive testimony of a single witness is entitled to more weight than that of several witnesses, equally credible, who testify negatively or to collateral circumstances, merely persuasive in their character, from which a negative may be inferred.⁷ But the rule that positive testimony is of greater weight than negative has some important exceptions, and it should never come in conflict with the general rule that the *weight* of the testimony *should be left to the jury*; such testimony is admissible, and, together with corroborating circumstances, may outweigh positive testimony.⁸ As will be seen from the cases already cited, this

question of the weight to be given to negative testimony often arises in *railroad and other accident cases* where it is claimed that signals were not given. In such cases, the question is purely for the jury, and it has often been held that negative evidence was sufficient to sustain a verdict.⁹ It is familiar practice to allow a witness, after he has described the situation, to state that he would have heard a bell or whistle, if it had sounded.¹⁰ The courts have frequently recognized a *qualification* of the general rule under discussion in those cases *where one witness testifies that a fact occurred and another, having the same or better means of knowledge, testifies positively that it did not occur*, each having testified as to his memory of the matter in difference.¹¹ The same principle applies to matters that must, from the nature of the case be notorious, such as the adverse possession of land.¹² This distinction is well drawn in an Illinois case where certain witnesses, equally credible, directly contradicted certain others as to whether the defendant did strike the blow. The court said: "Their statement should have had equal weight and consideration. Their testimony was as positive as to the fact in controversy as the testimony of the people's witnesses, and, if they had equal honesty, ability and opportunity of knowing what did transpire, and memory, their testimony would have had the same weight on a mind seeking to as-

certain the truth * * * * * If the witnesses on the part of the defendant had simply testified that they did not see the blow struck, this would, in the legal sense, have been negative evidence, * * * * * for it might be that they, although present, did not see the blow struck; but it could not be that any one saw what did not occur, or that an act was done by one not having the ability under the established state of things to do it." ¹³ It is beyond the scope of this work to enter upon any extended discussion of a subject, often debated, and especially by laymen, namely, the relative *weight of direct and circumstantial evidence*. In civil cases, it suffices that the evidence, whether direct or circumstantial, creates a preponderance of the proof. ¹⁴ It has sometimes been attempted to establish a rule to the effect that, in criminal cases, the amount of circumstantial evidence required to justify a verdict must be equal to the testimony of at least one witness swearing directly to the existence of the fact sought to be proved. ¹⁵ But it is the prevailing rule that, to warrant conviction for a crime, whether upon direct or circumstantial evidence, the jury must be satisfied to a moral certainty and beyond a reasonable doubt. ¹⁶ As the rule is sometimes stated, the circumstances proved must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused. ¹⁷

The attempts to prescribe arbitrary rules as to the weight of either of these forms of testimony have proved unsatisfactory; it is misleading to declare that either kind is, in a legal sense, inferior to the other. Both classes of testimony are indispensable in the administration of justice; and their relative value, depending upon the circumstances of each case, must be left to the jury.¹⁸

1, 1 Whart. Ev. sec. 415; Stark. Ev. sec. 867; Ralph v. Chicago & N. W. Ry. Co., 32 Wis. 177; Johnson v. State, 14 Ga. 55; Pool v. Devers, 30 Ala. 672; Auld v. Walton, 12 La. An. 129; Coles v. Perry, 7 Tex. 109; Allen v. Bond, 112 Ind. 523.

2, Stitt v. Huidekopers, 17 Wall. 384.

3, Draper v. Baker, 61 Wis. 450.

4, Farmers' & Mech. Bank v. Champlain Trans. Co., 23 Vt. 186; 56 Am. Dec. 68.

5, Horn v. Baltimore & Ohio Ry. Co., 54 Fed. Rep. 301; Atlanta & West Point Ry. Co. v. Johnson, 66 Ga. 259. But see, Hoffman v. Fitchburg Ry. Co., 22 N. Y. S. 463.

6, Hepburn v. Citizens' Bank, 2 La. An. 1007; 46 Am. Dec. 564; Harris v. Bell, 27 Ala. 520; Stark. Ev. 516.

7, Hinton v. Cream City Ry. Co., 65 Wis. 323; Pennoyer v. Allen, 56 Wis. 502; Sanborn v. Babcock, 33 Wis. 400; 3 Greenl. Ev. sec. 375.

8, Greany v. Long Island Ry. Co., 101 N. Y. 419; Lighthouse v. Chicago, M. & St. P. Ry. Co., 3 S. Dak. 518; Kelly v. Schupp, 60 Wis. 76; Nelson v. Iverson, 24 Ala. 9; 60 Am. Dec. 442; Stoddard v. Kelly's Adm., 50 Ala. 4; 2; State v. Gates, 20 Mo. 400.

9, Pence v. Chicago, R. I. & P. Ry. Co., 79 Iowa 389; Davis v. New York, N. H. & H. R. Ry. Co., 159 Mass. 532; Greany v. Long Island Ry. Co., 101 N. Y. 419; Eilert v. Green Bay & M. Ry. Co., 48 Wis. 606; Elkins v. Ken-

yon, 34 Wis. 93. See subject discussed in 2 Minn. L. Jour. 221, 245.

10, Chicago & A. Ry. Co. v. Dillon, 123 Ill. 570; Burnham v. Sherwood, 56 Conn. 229.

11, Potts v. House, 6 Ga. 324; 50 Am. Dec. 329; Innis v. State, 42 Ga. 482; Denham v. Holeman, 26 Ga. 182; 71 Am. Dec. 198; Marshall Dent. Manfg. Co. v. Harkenson, 84 Iowa 117; Burnham v. Sherwood, 56 Conn. 229.

12, Denham v. Holeman, 26 Ga. 182; 71 Am. Dec. 198.

13, Coughlin v. People, 18 Ill. 266; 68 Am. Dec. 541; Kansas City, F. S. & G. Ry. Co. v. Lane, 33 Kan. 702.

14, 3 Greenl. Ev. sec. 29. See sec. 193 *supra*.

15, Bixby v. Corskaddon, 55 Iowa 533.

16, Faulk v. State, 52 Ala. 415; People v. Padelia, 42 Cal. 535; Beavers v. State, 58 Ind. 530; Law v. State, 33 Tex. 37; Com. v. Webster, 5 Cush. 295; 52 Am. Dec. 711 and note; Wills Circumstantial Ev. 189; Burrill Circumstantial Ev. 198. See extended note, 62 Am. Dec. 179.

17, United States v. Martin, 2 McLean (U. S.) 256; Williams v. State, 41 Tex. 209; People v. Dick, 32 Cal. 213; United States v. Douglass, 2 Blatch. (U. S.) 207.

18, See discussion in an essay by Wills on Circumstantial Evidence, citing many cases; notes, 52 Am. Dec. 737; 62 Am. Dec. 179-188; 78 Am. Dec. 252, on use of circumstantial evidence in proof of *corpus delicti*. See works by Best and Burrill; also articles, 35 Alb. L. Jour. 44; 7 Am. L. Reg. N. S. 705. See sec. 171 *supra*.

§ 902. **Number of witnesses.**—Parties are generally allowed to call as many witnesses to establish the claim or defense as they may deem necessary. *If the court unduly limit or restrict this privilege, it is ground for a new trial.*¹ It is the familiar practice, however, for the trial judge to exercise a *discretion* as to the number of witnesses that

may be called to prove any *fact that is not disputed* or that is merely *collateral* to the main issue, or in case expert or impeaching testimony is being given,³ or where the testimony is merely *cumulative*.³ But the rejection of testimony, cumulative in its nature, may be ground for error when the evidence proposed relates to the main point in issue, or where the facts and circumstances are so numerous and varied that a large number of witnesses are required to determine the fact in issue.⁴ It has become almost a maxim that witnesses are not counted, but that their testimony is weighed.⁵ On this view, it is proper to instruct the jury that they are *not* necessarily to be *controlled by the mere numerical preponderance* of the witnesses on one side or the other, but that they should consider such preponderance with all the other facts and circumstances conducing to belief in the testimony of the witnesses on either hand.⁶ It is the general rule, in civil issues, that a claim or defense can be established by a single witness.⁷ The rules already given apply in the *criminal law*, except that in a few instances the common law, and later the constitution and statutes, required at least two witnesses to prove the crime. This is illustrated in the case of *treason*,⁸ and also in the case of *perjury*,⁹ but later cases hold that the jury may convict in actions for perjury on written and documentary evidence;¹⁰ and

one witness, corroborated by facts or documents, may outweigh a large number. It is error to instruct the jury to the effect that the preponderance of the evidence in all cases is to be determined by the number of equally credible and well informed witnesses testifying on each side.¹¹ But this is not in conflict with an instruction that, other things being equal, the greater number would carry the greater weight.¹² The distinction between the last two propositions is that the same number of witnesses may have equal credit and equal means of information, and yet differ greatly in the amount of evidence reported to the court or jury, and that the testimony of one witness may be more clear, consistent and convincing than the testimony of another.

1, Green v. Phoenix Ins. Co., 134 Ill. 310; Page v. Krekey, 137 N. Y. 307.

2, Green v. Phoenix Ins. Co., 134 Ill. 310. See sec. 814 *supra* and cases cited.

3, See sec. 814 *supra* and cases cited, also sec. 900 *supra*.

4, Green v. Phoenix Ins. Co., 134 Ill. 310. See sec. 814 *supra* and cases cited.

5, Alabama G. S. Ry. Co. v. Frazier, 93 Ala. 45; 30 Am. St. Rep. 28; Kinchelov v. State, 5 Humph. (Tenn.) 9; Howell Lumber Co. v. Campbell, 38 Neb. 567; Union Pacific Ry. Co. v. James, 56 Fed. Rep. 1001; Riley v. Butler, 36 Ind. 51; Proctor v. Terrill, 8 B. Mon. (Ky.) 451.

6, Alabama G. S. Ry. Co. v. Frazier, 93 Ala. 45; 30 Am. St. Rep. 28.

7, For illustrations of exceptional cases where one witness has been held insufficient, see, McDaniels v. Barnum, 5 Vt.

279; Langhran v. Keely, 8 Cush. 199; Wafford v. State, 44 Tex. 439; Sanborn v. Babcock, 33 Wis. 400.

8, U. S. Const. art. 3 sec. 3.

9, State v. Hayword, 1 Nott & McC. (S. C.) 546; Greenl. Ev. sec. 257; Underhill Ev. sec. 382.

10, United States v. Wood, 14 Peters 436.

11, Bierbach v. Goodvear Rubber Co., 54 Wis. 208; 41 Am. Rep. 19; State v. Musick, 71 Mo. 401; Fitzgerald v. Richardson, 30 Neb. 365; Chicago & A. Ry. Co. v. Fischer, 141 Ill. 614; Howlett v. Dilts, 4 Ind. App. 23; Jones v. State, 13 Tex. 168; 62 Am. Dec. 557; Goldstrohm v. Steiner, 155 Pa. St. 28. But the court should not dwell too much on this point, Leneberg v. Brotherton Iron Mine Co., 75 Mich. 84. Contra, Katzenbach v. Holt, 43 N. J. Eq. 536.

12, Spensley v. Lancashire Ins. Co., 62 Wis. 443; Mump-ton v. The Dale, 46 Fed. Rep. 670; Lillibridge v. Barber, 55 Conn. 366. See also, Jones v. State, 13 Tex. 168; 62 Am. Dec. 550.

§ 903. Credibility of witnesses.—Under other heads attention has been called to the degree of credence to be given to various kinds of testimony, and in many sections, under the general subject of the cross-examination of witnesses, we have illustrated the modes of testing the credibility of a witness. It now only remains to refer to some of those considerations, not elsewhere mentioned, which affect the credibility of the witness and which may be properly urged upon the jury. It is a familiar rule, often referred to in this work, that it is the peculiar and exclusive province of the jury to decide upon the credibility of witnesses;¹ and that, in the exercise of this duty, the court will not interfere with the

decision of the jury.² Nor is there any distinction in this respect between *civil and criminal cases*.³ It is not improper for the judge to instruct the jury that they may take into consideration the *interest of witnesses* in the result.⁴ But it is not within the proper province of the judge to instruct the jury as to the relative credibility of classes of witnesses whose testimony comes in conflict;⁵ and *if the judge invades the province of the jury* by attempting to dictate their verdict upon disputed questions of fact, left to their consideration, it is reversible error.⁶ The credit to be given to the testimony of an *accused person or an accomplice* is to be determined solely by the jury, although it is not error for the court to instruct the jury that they may consider such facts in connection with the other facts in the case, and that they have the right to take into consideration the interest or want of interest of the witnesses.⁷ While the jury may consider whether or not the *testimony of a detective* or private policeman should be taken with some allowance, yet an instruction to the effect that such evidence should be received with a large degree of caution has been held error.⁸ Although the *relationship* of the witness to either of the parties should not discredit him, still this is a circumstance to be weighed in a doubtful case.⁹ So also his social and business relations with the parties, his intimacy or hostility and

such other circumstances as might create bias may properly be considered.¹⁰ If an *attesting witness* tries to impeach the instrument to which his signature gives credit, his testimony should be received with caution by the jury.¹¹ It is but another illustration of the general principle, that it rests with the jury to determine the degree of credit to be given to *insane persons*, when they are permitted to testify.¹² The same is true as to *intoxicated witnesses*¹³ and as to *those* who have been *convicted of crime*.¹⁴ So the jury are the sole judge as to how far the *want of chastity* of a woman would impair the credibility of her testimony.¹⁵

1, Taylor v. Kelly, 31 Ala. 59; 68 Am. Dec. 150; Jones v. State, 13 Tex. 168; 62 Am. Dec. 550; Wing Chung v. Los Angeles, 47 Cal. 531; Walker v. State, 72 Ga. 200; Schimmelfenig v. Donovan, 13 Ill. App. 47; Mechelke v. Bramer, 59 Wis. 57; People v. Wallin, 55 Mich. 497; Finerty v. Fritz, 6 Col. 137; Nelson v. Vorce, 55 Ind. 455; Baker v. Young, 44 Ill. 42; 92 Am. Dec. 149; State v. Hoxsie, 15 R. I. 1; 2 Am. St. Rep. 838; Graham v. Anderson, 42 Ill. 514; 92 Am. Dec. 89; Flemming v. The Marine Ins. Co., 4 Whart. (Pa.) 59; 33 Am. Dec. 33; Illinois Cent. Ry. Co. v. Adams, 42 Ill. 474; 92 Am. Dec. 85; Childs v. State, 76 Ala. 93; Rider v. People, 110 Ill. 11; Frierson v. Galbraith, 12 Lea (Tenn.) 131; Wait v. M'Neil, 7 Mass. 261.

2, Illinois Cent. Ry. Co. v. Adams, 42 Ill. 474; 92 Am. Dec. 85. See secs. 171 *et seq. supra*.

3, Lewis v. Lewis, 9 Ind. 105.

4, Lovell v. Davis, 52 Mo. App. 342; New Orleans, J. & G. N. Ry. Co. v. Allbritton, 38 Miss. 242; 75 Am. Dec. 98.

5, Nelson v. Vorce, 55 Ind. 455; Metropolitan Ry.

Co. v. Jones, 1 App. Dec. 200; Hronek v. People, 134 Ill. 139; 23 Am. St. Rep. 652.

6, People v. Wallin, 55 Mich. 497; Kintner v. State, 45 Ind. 175; Engmann v. Estate of Immel, 59 Wis. 249; Moore v. State, 68 Ala. 380; Clevinger v. Curry, 81 Ill. 432. See elaborate note, 14 Am. St. Rep. 36. See sec. 171 *supra*.

7, State v. Morrison, 104 Mo. 638; People v. Cronin, 34 Cal. 191; People v. Crowley, 102 N. Y. 234; Anderson v. State, 104 Ind. 467; Wilkins v. State, 98 Ala. 1; Chambers v. People, 105 Ill. 489; State v. Moeichen, 53 Iowa 310; State v. Slingerland, 19 Nev. 135; Com. v. Orr, 138 Pa. St. 276; United States v. The Coquiltam, 57 Fed. Rep. 706; State v. Fi-ke, 63 Conn. 388, where the court instructed the jury to consider various matters of credibility and "above all" that the witness is the accused; Spies v. People, 122 Ill. 1; Davis v. State, 31 Neb. 240; State v. McGuire, 113 Mo. 670; Siebert v. People, 143 Ill. 571; Com. v. Wright, 107 Mass. 403, where it was held no error to refuse to instruct the jury that the presumption was in favor of the veracity of testimony of the accused and that the jury must consider his testimony with all the circumstances. Further as to accomplices, see secs. 787 *et seq. supra*; also sec. 749 *supra*.

8, Hronek v. People, 134 Ill. 139; 23 Am. St. Rep. 652. Nor is the court bound to instruct the jury that the testimony of spotters is to be received with caution and distrust, State v. Hoxsie, 15 R. I. 1; 2 Am. St. Rep. 838. As to the testimony of spies, Town of St. Charles v. O'Mailey, 18 Ill. 407.

9, Estate of Gangwere, 14 Pa. St. 417; 53 Am. Dec. 554.

10, See secs. 829, 830, 853 *supra*.

11, Highberger v. Stiffler, 21 Md. 338; 83 Am. Dec. 593.

12, Holcomb v. Holcomb, 28 Conn. 177; State v. Kelley, 57 N. H. 549; Worthington v. Mercer, 96 Ala. 310; 1 Whart. Ev. (3rd ed.) sec. 403.

13, State v. Castello, 62 Iowa 404.

14, See secs. 734 *et seq. supra*.

15, Jones v. State, 13 Tex. 168; 62 Am. Dec. 556.

§ 904. Same, continued.—In passing upon testimony, the jury may properly take into consideration the presumption that an unimpeached witness testifies truthfully, and, in the case of apparent conflict, the evidence should be closely scrutinized, so that, if possible, differences in the testimony may be harmonized;¹ and in whatever form a conflict in testimony arises, *it belongs to the jury to determine what testimony is deserving of credit.*² So the jury are to judge as to whether a witness has been impeached, after considering all the evidence, including conflicting statements made by him and the testimony as to his reputation for veracity; and, although *impeaching testimony* has been received, it is still competent for the jury to determine to what extent they will believe or disbelieve the evidence of the witness who is thus attacked.³ So the jury may take into consideration the memory, the motives, the intelligence and the appearance of the witness on the stand, his means of information, his evident bias or his candor and fairness, as well as the consistency of his testimony and the interest or want of interest in the result.⁴ In all these matters, the jury may be instructed to this effect.⁵ But in a criminal case, it was held error to instruct the jury that, in determining the credibility of defendant's testimony, they had a right to take into consideration his demeanor and conduct, not only on

the witness stand, but also such demeanor and conduct during the trial.⁶ *Although jurors are the judges of the credibility of witnesses, they should judge of this fact, as of any other in the case, from evidence.* They have not the right arbitrarily and capriciously to wholly reject the testimony of witnesses in no way impeached or discredited.⁷ Hence, they may be properly instructed that, where testimony is uncontradicted, it should be accepted, unless it is in some way discredited.⁸ But obviously the *testimony* of a witness may be contradicted or *discredited by circumstances* as well as by the statements of other witnesses.⁹ And in arriving at their conclusion, they may of course scrutinize the testimony of any witness, and they have the right to give full consideration to the bias, the relationship, the character and the interest of the witness or to the fact that he is a party, or any other fact which may affect his credit;¹⁰ and even where there is no direct evidence contradicting a witness, a jury is not bound to accept his testimony as true, if it contains improbabilities or if there are reasonable grounds for concluding that it is false.¹¹

1, Woodcock v. Bennet, 1 Cow. 711; 13 Am. Dec. 568.

2, Swan v. People, 98 Ill. 610; Springfield v. State, 96 Ala. 81; 38 Am. St. Rep. 85; Dunn v. People, 29 N. Y. 523; 86 Am. Dec. 319; Second Nat. Bank v. Donald, 56 Minn. 491; Nolan v. Heard, 87 Ga. 293; Elwood v. Western Union Tel. Co., 45 N. Y. 549; 6 Am. Rep. 140; Kavanagh v. Wilson, 70 N. Y. 177; Koehler v. Adler, 78 N. Y. 287.

3, *Hodgkins v. State*, 89 Ga. 761; *State v. Miller*, 53 Iowa 209; *Brown v. State*, 18 Ohio St. 496.

4, *United States v. Ybanez*, 53 Fed. Rep. 536; *Corgan v. Frew*, 39 Ill. 31; 89 Am. Dec. 286; *Hartford L. Ins. Co. v. Gray*, 80 Ill. 28. See also, *Newton v. Pope*, 1 Cow. 110, where it is held that the jury has not the right to disregard the testimony of a witness, upon the sole ground of being satisfied that he is biased. In *Wiedemann v. Ryan*, 34 Ill. App. 568, it was held an error to instruct the jury to take into consideration the business of a witness.

5, *State v. Keys*, 53 Kan. 674; *Central Ry. & B. Co. v. Attaway*, 90 Ga. 656; *Com. v. Orr*, 138 Pa. St. 276.

6, *Purdy v. People*, 140 Ill. 46.

7, *Robertson v. Dodge*, 28 Ill. 161; 81 Am. Dec. 267 and note; *Edler v. Uchtmann*, 10 Ill. App. 488; *Lomer v. Meeker*, 25 N. Y. 361. See also, *Second Nat. Bank of Winoona v. Donald*, 56 Minn. 491.

8, *Engmann v. Estate of Immel*, 59 Wis. 249.

9, *Koehler v. Adler*, 78 N. Y. 287; *Watson v. Watson*, 58 Mich. 507; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549; 6 Am. Rep. 140; *Kavanagh v. Wilson*, 70 N. Y. 177.

10, *Kansas Pac. Ry. Co. v. Little*, 19 Kan. 267. See also the cases already cited, many of which sustain this proposition.

11, *Tracey v. Phelps*, 22 Fed. Rep. 634; *Anderson v. Liljengren*, 50 Minn. 3. See next section.

§ 905. Same, continued.—Growing out of the old rule of law that one indicted and convicted of wilful perjury was not a competent witness in any case is the well known legal maxim, *falsus in uno, falsus in omnibus*, which, when applied to the law of evidence, means that a witness who has been found to swear falsely as to one matter is not worthy of belief in other matters. The reason for

this rule, according to Mr. Starkie, is that, "as the credit due to a witness is founded in the first instance on general experience of human veracity, it follows that a witness who gives false testimony as to one particular cannot be credited as to any. . . . The presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury. Faith in a witness' testimony cannot be partial or fractional."¹ On the same general theory, Judge Story declared the rule as follows: "Where a party speaks to a fact in respect to which he cannot be presumed liable to mistake, as in relation to the country of his birth, or his being in a vessel on a particular voyage, or living in a particular place, if the fact turn out otherwise, it is extremely difficult to exempt him from the charge of deliberate falsehood; and courts of justice, under such circumstances, are bound upon principles of law and morality and justice to apply the maxim *falsus in uno, falsus in omnibus*. What ground of judicial belief can there be left when the party has shown such gross insensibility to the difference between right and wrong, between truth and falsehood?"² There are, however, several *limitations* to the general rule. First, the *testimony*, concerning which the witness has sworn falsely, *must relate to a material point* in issue;³ second, such testimony must have been given by

the witness wilfully, and he must have *known it to be false*,⁴ hence erroneous statements, made in good faith through lack of memory or inadvertence, will not thus discredit the witness;⁵ third, since credibility is a question for the jury, it is *error* for the judge in his instruction to the jury, to *single out a particular witness* and to direct such cautionary instructions against his testimony, as such a course would tend to convey to the jury the impression that that particular witness is disbelieved by the judge;⁶ fourth, such *testimony* as is *corroborated by other credible evidence* or by facts and circumstances which may be fairly inferred from the same should be given proper weight by the jury;⁷ fifth, the *instruction* should *not be so framed as to direct or require the jury to disregard the testimony of such witness entirely*; but the rule should be applied by the jury according to their own judgment for the ascertainment of truth.⁸ On this last point there has been some difference of opinion; and it has sometimes been urged that, when a witness has wilfully and knowingly perjured himself as to any material point, the jury are bound not to give weight to his testimony, unless corroborated by other evidence; and it has even been held that such testimony should not be submitted to the jury.⁹ But some of these decisions are based on authorities from the civil law and on cases in courts of equity or

admiralty, and are not applicable in a procedure where the jury have the exclusive right to weigh the testimony; and though the presumption that a witness has testified to the truth may be removed, yet it still belongs to the jury to determine this fact and to weigh such evidence.¹⁰ Hence, according to the better reasoning and the weight of authority, the maxim, *falsus in uno, falsus in omnibus*, is a rule of permission and not a mandatory one. It is in the discretion of the jury to wholly reject the testimony of a witness whom they believe to have testified falsely in some particulars or to accept some of his statements and reject others.¹¹

1, Stark. Ev. 873.

2, The Santissima Trinidad, 7 Wheat. 339.

3, Pierce v. State, 53 Ga. 365; Hall v. Renfro, 3 Met. (Ky.) 52; Moresi v. Swift, 15 Nev. 216. Contra, Huber v. Teuber, 3 McArth. (D. C.) 484; The Santissima Trinidad, 7 Wheat. 339; People v. Reghetti, 66 Cal. 184.

4, Childs v. State, 76 Ala. 93; Skipper v. State, 59 Ga. 65; Gullihier v. People, 82 Ill. 145; Goeing v. Outhouse, 95 Ill. 346; Callohan v. Shaw, 24 Iowa 441; Vicksburg Ry. Co. v. Herrick, 62 Miss. 28; Follette v. Territory, (Ariz.) 33 Pac. Rep. 869.

5, Winter v. Central Iowa Ry. Co., 80 Iowa 443; Barney v. Dudley, 40 Kan. 247; Plyer v. German American Ins. Co., 121 N. Y. 689; People v. Strong, 30 Cal. 151; People v. Soto, 59 Cal. 369; Brennan v. People, 15 Ill. 516; Giltner v. Gorham, 4 McLean (U. S.) 424; State v. Elkins, 63 Mo. 159.

6, State v. Stout, 31 Mo. 406; State v. Cushing, 29 Mo. 215.

7, *Loehr v. People*, 132 Ill. 504; *Hillman v. Schwenk*, 68 Mich. 293; *Allen v. Murray*, 87 Wis. 41; *Blotcky v. Caplan*, (Iowa) 59 N. W. Rep. 204.

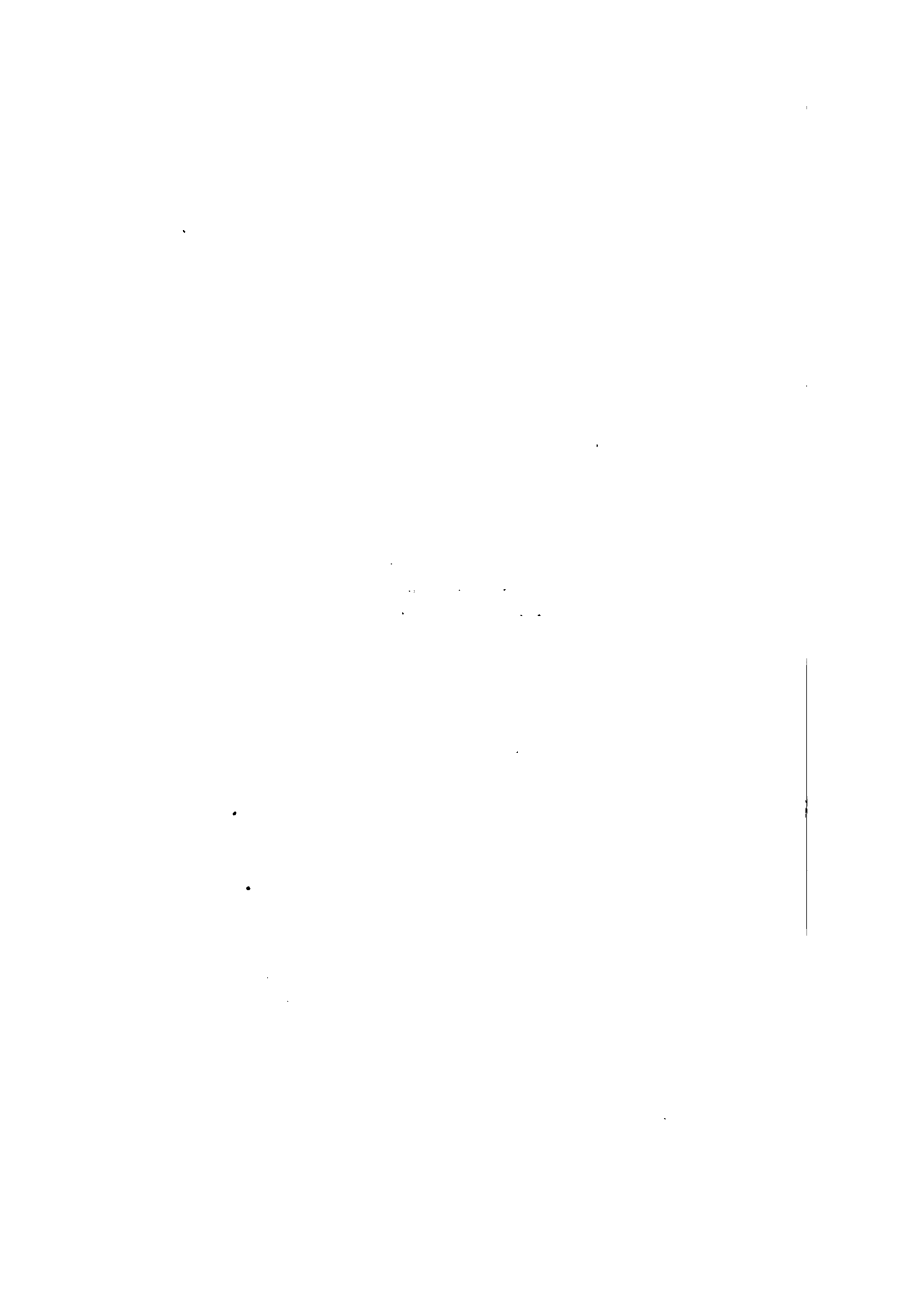
8, *State v. Smith*, 8 Jones (N. C.) 132; *State v. Brantly*, 63 N. C. 518; *Pierce v. Selleck*, 18 Conn. 321; *Lewis v. Hodgdon*, 17 Me. 267; *Finly v. Hunt*, 56 Miss. 221; *Hall v. Renfro*, 3 Met. (Ky.) 32; *Senter v. Carr*, 15 N. H. 351.

9, *Stoffer v. State*, 15 Ohio St. 47; *Hargraves v. Miller's Adm.*, 16 Ohio 344; *State v. Jim*, 1 Dev. (N. C.) 509; *Dunlop v. Patterson*, 5 Cow. 243; *Huber v. Teuber*, 3 McArth. (D. C.) 484; *People v. Righetti*, 66 Cal. 184; *Underhill Ev. sec.* 351.

10, *Mead v. McGraw*, 19 Ohio St. 55, reversing *Stoffer v. State*, 15 Ohio St. 47; *Mercer v. Wright*, 3 Wis. 645; *Lemmon v. Moore*, 94 Ind. 40.

11, *Furson v. Galbraith*, 12 Lea (Tenn.) 129; *Otmer v. People*, 76 Ill. 149; *Swan v. People*, 98 Ill. 612; *State v. Williams*, 2 Jones (N. C.) 257; *Knowles v. People*, 15 Mich. 411; *Lewis v. Hodgdon*, 17 Me. 267; *State v. Baker*, 89 Iowa 188; *Church v. Chicago & A. Ry. Co.*, 119 Mo. 203; *Cole v. Lake Shore & M. S. Ry. Co.*, 95 Mich. 77.

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